

COMMENTS

GAGGING ON A BAD RULE:¹ THE MEXICO CITY POLICY AND ITS EFFECT ON WOMEN IN DEVELOPING COUNTRIES

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† St. Mary's University School of Law, Candidate for J.D., May 2003; Texas A&M University-Kingsville, B.A. Political Science, May 2000. First, I would like to thank my grandmother, the late Beatrice F. Aguilar, who always knew that I would become a lawyer and encouraged me to obtain a legal education. I would also like to thank my grandfather, Ramey H. Aguilar, for always supporting me in all my endeavors. In addition, I would like to thank Diana Perez and Dean Bill Piatt for nominating me as the recipient of the Lee H. Lytton Scholarship. This scholarship was instrumental in enabling me to participate in the academic experience of writing for a law review. A special thank you to Professor Reynaldo Anaya Valencia for his guidance and support in the completion of this comment. Additionally, I would like to thank all of the staff writers whose diligent efforts both enriched and refined the content of this comment and advanced its completion. In particular, I would like to thank Anna Lisa Garcia, Jenee Margo Gonzales, Deb Ireland, Renee Jaime, Paul R. Penny, III (Trey), Nicole True, James Walker, and Ray Zapata. Lastly, I would like to thank all of the Editors who contributed to the development of this comment. This comment is dedicated to the memory of my grandmother, Beatrice F. Aguilar, and to the voiceless women of developing nations. I hope that in the very least, I have provided a voice for the women of developing nations whose lives are adversely affected by the Global Gag Rule.

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I. INTRODUCTION

Women make up seventy percent of the world's one billion poorest people.² On a daily basis, an average of 1,440 women around the world die due to pregnancy complications, defective abortions, miscarriage, or while giving birth.³ A woman living in the United States has a one in

2. *Reproductive Equality*, BOSTON GLOBE, Mar. 8, 2001, at A16, available at 2001 WL 3922822.

3. See *id.* (calculating that every minute of every day (60 minutes x 24 hours = 1440 women) a woman somewhere in the world dies during childbirth complications).

3,500 chance of dying as a result of her pregnancy.⁴ In contrast, a woman living in a developing country, such as Ethiopia, has a one in seven chance of dying from pregnancy complications.⁵ One factor contributing to the difference between mortality rates of women in developing countries versus women in developed countries is access to family planning services.⁶ As we continue into the millennium, women in developing countries are about to face more hardships when trying to access family planning services.⁷ On January 22, 2001, President George W. Bush reinstated the Mexico City Policy,⁸ also known as the Global Gag Rule.⁹

Consider the story of Min Min Lama, a thirteen-year-old girl from Nepal.¹⁰ Min Min was raped by a relative and became pregnant.¹¹ At the time of her rape, abortion was illegal under any circumstance in Nepal.¹² Min Min tried to conceal the rape and resulting pregnancy from her family; however, she was unsuccessful.¹³ A family member realized that Min

4. *Family Planning Saves Lives*, SOUTH FLORIDA SUN-SENTINEL, May 15, 2001, at 14A, available at 2001 WL 2677662 (stating that an American woman's chance of dying from pregnancy complication is one in 3,500). But see *Reproductive Equality*, *supra* note 2 (stating that one in 3,750 American women die from pregnancy complications).

5. *Family Planning Saves Lives*, *supra* note 4; *Reproductive Equality*, *supra* note 2.

6. See *Reproductive Equality*, *supra* note 2.

7. Family planning is defined as "a program to regulate the number and spacing of children in a family through the practice of contraception or other methods of birth control." Your Dictionary.com, at <http://www.yourdictionary.com/ahd/f/f0028000.html> (last visited Jan. 18, 2003).

8. President's Memorandum on Restoration of the Mexico City Policy, 37 WEEKLY COMP. PRES. DOC. 216 (Jan. 29, 2001).

9. CTR. FOR REPROD. RIGHTS, THE BUSH GLOBAL GAG RULE: A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND THE U.S. CONSTITUTION (2001), http://www.reproductive.org/pub_art_ggr.html (last visited Mar. 31, 2003) [hereinafter A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND THE U.S. CONSTITUTION] (stating the Global Gag Rule prohibits foreign non-governmental organizations from utilizing monies to provide accurate and full information about "all legal medical options to female patients, perform legal abortions, or lobby their own governments for abortion law reform").

10. See Isabelle Lindenmayer, *Fighting the Global Gag Rule*, NATION, Aug. 23, 2001 available at <http://www.thenation.com/doc.mhtml?i=20010820&s=lindenmayer20010823> (last visited Jan. 21, 2003); *Mexico City Policy: Effects of Restrictions: Hearings Before the Senate Foreign Relation Comm.*, 107th Cong. (2001) (statement of Dr. Nirmal K. Bista, Director General, Family Planning Ass'n of Nepal) [hereinafter *Hearings*, statement of Dr. Nirmal K. Bista] available at 2001 WL 21757633.

11. See *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10; see also Lindenmayer, *supra* note 10.

12. *Id.* (stating that Nepal has one of the most severe abortion laws in the world in terms of punishment); *Women's Groups Hail Passage of Abortion Bill*, KATHMANDU POST, Sept. 27, 2002, available at <http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2002/sep/sep28/index.htm> (last visited Feb. 10, 2003) (noting the passage of the 11th Amendment Bill that legalized abortion in certain circumstances).

13. *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10.

Min was pregnant and consulted with other relatives to arrange for an abortion.¹⁴ Despite the risk of death, Min Min had the illegal abortion which was arranged by her family members.¹⁵ When one of Min Min's relatives informed the authorities about the abortion,¹⁶ Min Min was charged with the crime of "having an abortion" and sentenced to twenty years in prison.¹⁷ In cases such as Min Min's, it is vital to a woman's mental and physical safety to have abortion available as an option. Further, should a woman choose to include abortion as a family planning option she should have access to neutral information regarding abortion in order to make an educated choice.

The purpose of this comment is to examine President Bush's Global Gag Rule and its effect on women in developing countries. Part II consists of the history of foreign assistance programs and how their development led to the implementation of the Mexico City Policy. This will include an in-depth examination of the creation of the United States Agency for International Development and its connection with the Mexico City Policy. Part III discusses the role of non-governmental organizations in women's rights. Part IV covers the interpretation of the Mexico City Policy, including restrictions, exemptions, allowances, verification, and sanctions. The chilling effects of the Mexico City Policy are discussed in Part V. Part VI examines specific countries affected by the Mexico City Policy and categorizes them according to their respective abortion laws. A brief discussion of the Mexico City Policy and ways in which it runs counter to international treaties follows in Part VII. Part VIII is an overview of the case law challenging the constitutionality of the Mexico City Policy. Lastly, this Comment includes a proposal that the United States Congress work to repeal the Global Gag Rule or, at the very least, partially repeal a section of the policy to limit its effect.

II. HISTORY

The creation of the United States' foreign assistance policy began with the conclusion of World War II and subsequent development of the Marshall Plan in 1948.¹⁸ The Marshall Plan was specifically designed to be

14. *Id.*

15. *Id.*

16. *Id.*

17. Lindenmayer, *supra* note 10. After serving two years in prison, Min Min was released from prison due to the lobbying efforts of the Family Planning Association of Nepal, a non-governmental organization which led a campaign to change the abortion laws in Nepal. *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10.

18. See U.S. AGENCY FOR INT'L DEV., A HISTORY OF FOREIGN ASSISTANCE (2001), at <http://www.usaid.gov/about/usaidthist.html> (last visited Jan. 5, 2002). The Marshall Plan was established on April 2, 1948. *Id.*

only a temporary emergency recovery program for the stabilization of Europe; thus United States aid provided by the Plan ended in 1951.¹⁹ However, United States foreign assistance did not come to a complete halt. Throughout the 1950s, Congress continued to develop foreign assistance programs, and made financial aid available to nations worldwide.²⁰

During the United States presidential campaign of 1960, aid to developing countries became a significant issue as Americans and Congress grew less supportive of the existing programs.²¹ After his election to the presidency in 1960, John F. Kennedy and his administration made a commitment to the reorganization of foreign assistance programs.²² This reorganization of the foreign assistance programs became known as the Foreign Assistance Act (FAA)²³ and was passed by Congress on September 4, 1961.²⁴ The United States Agency for International Development (USAID) was established by President John F. Kennedy shortly after Congress passed the FAA of 1961.²⁵ USAID is a foreign assistance agency that focuses on providing long-range economic and social development support to developing nations worldwide.²⁶

19. See *id.* (describing the Marshall Plan as an "emergency tool of assistance"); H.R. REP. NO. 80-1585, at 1 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1349 (declaring that the European recovery program was to continue until 1952).

20. See U.S. AGENCY FOR INT'L DEV., *supra* note 18 (discussing the various foreign aid programs implemented throughout the 1950s). In 1951, Congress passed the Mutual Security Act, which provided foreign aid by combining military and economic programs along with technical assistance. Mutual Security Act of 1951, Pub. L. No. 82-165, § 2, 65 Stat. 373 (1951) (*repealed* 1954). In 1953, the Foreign Operations Administration was created to combine economic and technical assistance globally. Reorg. Plan No. 7 of 1953, 18 Fed. Reg. 4541, *reprinted in* 5 U.S.C. app. at 1499 (1994), and in 67 Stat. 639 (1953). Two years later, the Foreign Operations Administration was terminated and its duties transferred to the International Cooperation Administration (ICA). Exec. Order No. 10610, 20 Fed. Reg. 3179 (May 9, 1955), 1955 WL 6642. In 1954, food aid commenced through the Food for Peace program and developmental and security assistance was provided by the Mutual Security Act of 1954. See Agricultural Trade Development and Trade Assistance Act of 1954, Pub. L. No. 83-480, § 101, 68 Stat. 454, 455 (1954) (codified as amended at 7 U.S.C. § 1691 (1994)); Mutual Security Act of 1954, Pub. L. No. 83-665, § 101, 68 Stat. 832, 833 (1954) (*repealed* 1961). The revised Mutual Security Act of 1957 created the Development Loan Fund (DLF), which was the lending institution for the ICA. Mutual Security Act of 1957, Pub. L. No. 85-141, § 202, 71 Stat. 355, 357-58.

21. U.S. AGENCY FOR INT'L DEV., *supra* note 18.

22. *Id.*

23. Pub. L. No. 87-195, 75 Stat. 424.

24. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424; U.S. AGENCY FOR INT'L DEV., *supra* note 18.

25. Exec. Order No. 10973, 26 Fed. Reg. 10469 (Nov. 3, 1961) (ordering the establishment of the Agency for International Development); see also U.S. AGENCY FOR INT'L DEV., *supra* note 18 (describing historical development of USAID program).

26. U.S. AGENCY FOR INT'L DEV., *supra* note 18.

In addition to the organizational issues affecting foreign aid, population control concerns began affecting United States foreign assistance programs throughout the 1960s.²⁷ The United States, under the leadership of President Lyndon B. Johnson, began to actively promote population control policies in developing countries.²⁸ The FAA of 1963 was amended in 1967 to expand the capabilities of USAID in an effort to promote birth control in developing countries.²⁹ This allowed USAID to distribute contraceptives and offer financial assistance to both governmental and non-governmental organizations (NGOs) in developing nations.³⁰

By the early 1970s, Congress was yet again ready to reform foreign assistance programs.³¹ This reform included new categories, such as family planning, in an effort to focus on the "basic human needs" of individuals in developing countries.³² In 1973, Republican Senator Jesse Helms sponsored the Helms Amendment to the FAA of 1961.³³ The Helms Amendment prohibits the use of American dollars for the performance of abortion, to encourage or compel a person to practice abortion, or to research abortion.³⁴ Essentially, the Helms Amendment restricts governmental organizations and NGOs from using funds received from USAID

27. See H.R. CONF. REP. NO. 88-1006 at § 105 (1963), *reprinted in* 1963 U.S.C.A.N. 1242, 1248 (reporting that the need for funds to conduct research in the area of population control were warranted under the Foreign Assistance Act of 1963); *see also* James G. Connell, III, Note, *Norplant and the New Paradigm of International Population Control Policy*, 2 WM. & MARY J. WOMEN & L. 73, 78 (1995) (describing the different programs that were established to study issues in populations growth).

28. See Connell, *supra* note 27, at 78-79. Congress passed the FAA of 1963, which allowed the study of population control issues as developmental research. *See id.*

29. Foreign Assistance Act of 1967, Pub. L. No. 90-137, § 291, 81 Stat. 445, 452-53 (1967); Connell, *supra* note 27, at 79.

30. Foreign Assistance Act of 1967 § 291; Connell, *supra* note 27, at 79-80.

31. See Connell, *supra* note 27, at 80-81 (discussing amendments to the Foreign Assistance Act of 1961 during the 1970s); *see also* U.S. AGENCY FOR INT'L DEV., *supra* note 18 (outlining the legislative history of the Foreign Assistance Act during the 1970s).

32. U.S. AGENCY FOR INT'L DEV., *supra* note 18. The new categories, aimed at family planning, education, and agriculture, were established by the 1973 amendments to the FAA. Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 103, 83 Stat. 714, 715 (1973). These categories represent the current structure of the FAA. *See* U.S. AGENCY FOR INT'L DEV., *supra* note 18.

33. Foreign Assistance Act of 1973 § 114, 87 Stat. at 716 (1973) (codified at 22 U.S.C. § 2151b(f)(1) (2000)). *See* Connell, *supra* note 27, at 81 (stating that Congress passed the Helms Amendment in 1973); *see also* Laura Mansnerus, *Abortion Rights Group Files Suit Over Bush Family Planning Rule*, N. Y. TIMES, June 7, 2001, available at <http://www.nytimes.com/2001/06/07/politics/07ABOR.html> (last visited Jan. 22, 2003) (stating the use of United States funds for abortion has been prohibited since 1973, under the Amendment sponsored by Republican Senator Jesse Helms).

34. 22 U.S.C. § 2151b(f) (1994). Text of the Helms Amendment is as follows:

to perform, encourage, compel, practice, or research abortion.³⁵ However, governmental organizations and NGOs were free to use their own, non-USAID funds, for family planning services of their choice, including abortion.³⁶

During the Reagan administration, the Helms Amendment was expanded to forbid funding of international family planning services, which provided or advocated abortions.³⁷ The 1984 restrictions on United States funding abroad were formally introduced at the International Conference on Population in Mexico City.³⁸ Therefore, the guidelines became known as the Mexico City Policy, also referred to as the Global Gag Rule.³⁹ This restrictive policy was implemented by way of a Standard Clause which all foreign non-governmental organizations were required to sign prior to receiving funds from USAID.⁴⁰ President George H. Bush, a Republican, continued to enforce the Mexico City Policy during his administration.⁴¹

(f) Prohibition on use of funds for performance or research respecting abortions or involuntary sterilization:

(1) None of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.

(2) None of the funds made available to carry out subchapter I of this chapter may be used to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations.

(3) None of the funds made available to carry out subchapter I of this chapter may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of abortions or involuntary sterilization as a means of family planning.

Id.

35. *Id.*

36. See *Planned Parenthood Fed'n, Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 655 (2d Cir. 1988) (stating that § 2151b(f) only places limitations on federal funds for abortion related activities and does not apply to non-federal funds).

37. 48 C.F.R. § 752.7016 (2002) (requiring a clause that prohibits funds distributed by the Agency for International Development from being used to promote abortion). See Mansnerus, *supra* note 33; Akhilesh Upadhyay, *Nepalis, Among Others, File Suit Against U.S. President*, KATHMANDU POST, June 9, 2001, available at <http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2001/jun/jun09/index.htm> (last visited Jan. 23, 2002).

38. See Connell, *supra* note 27, at 81-82; Upadhyay, *supra* note 37.

39. See Connell, *supra* note 27, at 82; Upadhyay, *supra* note 37.

40. Ann Marie Gillette, Case Comment, *Constitutional Law-First Amendment-United States Restricts Funding to Foreign Nongovernmental Organizations Performing or Promoting Abortions*, *Planned Parenthood Fed'n of America, Inc., et al. v. Agency for Int'l Dev.*, 915 F.2d 59 (2d Cir. 1990), 15 SUFFOLK TRANSNAT'L L.J. 768, 771 (1992).

41. Upadhyay, *supra* note 37.

Then in 1993, President Bill Clinton, a Democrat, repealed the Mexico City Policy.⁴² However, in 1999, a temporary reinforcement of the Global Gag Rule was mandated.⁴³ This one-year reinstatement of the rule was the result of negotiations between the Clinton administration and Congress to absolve America's United Nation dues.⁴⁴ In 2000, the Clinton administration successfully eradicated the Mexico City Policy from the 2001 fiscal budget.⁴⁵ However, part of the negotiations stipulated that Clinton's successor would have the final word on the issue.⁴⁶

In the controversial 2000 Presidential election, former Republican President George Bush's son, George W. Bush, was elected.⁴⁷ The first item on his agenda was to reinstate the Global Gag Rule on January 22, 2001.⁴⁸ In his memorandum to the USAID Administrator, President George W. Bush stated, "It is my conviction that taxpayer funds should not be used to pay for abortions or advocate or actively promote abortion, either here or abroad."⁴⁹

On March 28, 2001, President Bush issued a Presidential Memorandum specifically prohibiting foreign NGOs⁵⁰ from utilizing their private funds

42. See Mansnerus, *supra* note 33; Upadhyay, *supra* note 37.

43. Upadhyay, *supra* note 37. The rescission of the Mexico City Policy by President Bill Clinton meant that foreign NGOs no longer had to sign the Standard Clause as a prerequisite to obtaining USAID funds. However, they were still prohibited from using the funds obtained from USAID for abortion related activities.

44. See Upadhyay, *supra* note 37 (explaining the reason why the Clinton administration allowed a temporary reinforcement of the Mexico City Policy as a negotiation to pay America's United Nation dues).

45. *Id.*

46. *Id.*

47. *Victory Restores Bush Dynasty to Washington*, Dec. 13, 2000, at <http://www.cnn.com/2000/ALLPOLITICS/stories/12/13/president.bush/index.html> (last visited Jan. 23, 2003) (citing the United States Supreme Court ruling which effectively ceded Florida's twenty-five electoral votes to George W. Bush).

48. See Mansnerus, *supra* note 33 (stating the date of reinstatement of Global Gag Rule as January 22, 2001); see also Surendra Phuyal, *US Rule Leads Nepali Clinics to Closure*, KATHMANDU POST, Aug. 20, 2001, available at <http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2001/aug/aug20/> (last visited Jan. 23, 2003) (citing the reinstatement of the Mexico City Policy as the first executive order issued by newly elected President George W. Bush).

49. President's Memorandum on Restoration of the Mexico City Policy, 37 WEEKLY COMP. PRES. DOC. 216 (Jan. 29, 2001). This statement by President George W. Bush was the reasoning behind the restoration of the Mexico City Policy. See *id.*

50. The Presidential memorandum defines a foreign NGO as "a nongovernmental organization that is not organized under the laws of any State of the United States, the District of Columbia or the Commonwealth of Puerto Rico." President's Memorandum on Restoration of the Mexico City Policy, 3 C.F.R. 873, 874 (2002).

for: 1) providing abortions, yet listing a few exceptions;⁵¹ 2) imparting advice and information on legal abortions or referring clients to clinics which conduct abortions; 3) lobbying to legalize, liberalize, maintain, or decriminalize abortion laws; and 4) conducting public information operations concerning abortion in countries which receive USAID funds.⁵² In contrast, United States based NGOs are not bound by the strict requirements of the Global Gag Rule unless they assist foreign NGOs with USAID funds.⁵³ Further, foreign governmental organizations are allowed to receive USAID funds even though their governments may include abortion as a family planning option, with the provision the USAID funds are kept in a separate account and not used for abortion-related activities.⁵⁴

III. THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS IN WOMEN'S RIGHTS

Non-governmental organizations have been and continue to be essential in advancing the rights of women worldwide.⁵⁵ The remarkable development of women's rights as an international issue can be attributed to the coordinated efforts of NGOs working closely in the United Nations' system.⁵⁶ NGOs have been largely responsible for lobbying their governments and the United Nations on such issues as violence against women in times of conflict, domestic violence, rape, sexual harassment, health issues, violent cultural practices, violent religious practices, trafficking

51. The prohibition on the use of private funds for providing abortions "does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortions under these circumstances is not a family planning act)." *Id.*

52. *Id.* at 878; CTR. FOR REPROD. LAW AND POLICY, THE BUSH GLOBAL GAG RULE: WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, in THE GLOBAL GAG RULE ENDANGERS WOMEN'S HEALTH AND DEMOCRACY TAKE ACTION! (2001) [hereinafter WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?].

53. See 3 C.F.R. 873, 886. "These paragraphs need not be included in assistance agreements with United States nongovernmental organizations for family planning purposes if implementation of the activity does not involve assistance to foreign nongovernmental organizations." *Id.*; see also POPULATION ACTION INT'L, WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS: AN UNOFFICIAL GUIDE 1 (2001) [hereinafter WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS] (citing the fact that the Global Gag Rule is not enforced on domestic NGOs).

54. See 3 C.F.R. 873; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 3 (stating that "non-governmental organizations are not subject to the policy").

55. See RADHIKA COOMARASWAMY, REINVENTING INTERNATIONAL LAW: WOMEN'S RIGHTS AS HUMAN RIGHTS IN THE INTERNATIONAL COMMUNITY 14-16 (1997) (detailing the strides made with regard to women's rights due to the coordinated efforts of NGOs).

56. COOMARASWAMY, *supra* note 55, at 14.

and forced prostitution.⁵⁷ The role of NGOs in lobbying the United Nations is vital in establishing women's rights as human rights in the international arena.⁵⁸ This would include establishing a woman's right to reproductive health, including abortion, as a human right.⁵⁹

Donor programs, including USAID, utilize varying methods to distribute funds to developing countries for population control.⁶⁰ Traditionally, the funds have been dispersed evenly through three major avenues; however, the current trend shows more funds are being dispersed to developing countries through NGOs than any other method.⁶¹ This suggests NGOs play a vital role in providing women in developing countries with access to family planning services.

IV. INTERPRETING THE MEXICO CITY POLICY

Although the ideology supporting the restoration of the Mexico City Policy may seem very simple, the application of the policy is strict and complicated. Further, NGOs operating under the restrictions agree to be audited at any time, and penalties will be assessed for violations of the Global Gag Rule.⁶² Due to the fact that NGOs are providing necessary services to the poorest people in the world, it is very important that proper interpretations of this rule are practiced. For this reason, at least two United States based NGOs, the Center for Reproductive Law and Policy (CRLP), and Population Action International (PAI), have undertaken the task of compiling reference guides for applying the Global Gag Rule.⁶³

57. *See id.* at 14-17.

58. *Id.* at 16.

59. *See id.* at 25.

60. *See* SHANTI R. CONLY & SHYAMI DE SILVA, POPULATION ACTION INT'L, EXTRACTS FROM PAYING THEIR FAIR SHARE?: DONOR COUNTRIES AND INTERNATIONAL POPULATION ASSISTANCE 7 (1998) (naming the three major channels for dispersing funds as: 1) the UN system 2) direct country-to-country aid, and 3) through the NGO community).

61. *See id.*

62. *See* President's Memorandum on Restoration of the Mexico City Policy, 3 C.F.R. 873, 875-77 (2002) (describing the auditing process and penalties enforced in the event of a violation).

63. *See* WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52; *see also* WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53. The CRLP has changed its name to the Center for Reproductive Rights, however this comment will continue to refer to the organization as the CRLP. The CRLP is a non-profit United States based NGO, which advocates human rights around the world. *See* CTR. FOR REPROD. LAW AND POLICY, Center for Reproductive Law and Policy (CRLP) v. Bush, in THE GLOBAL GAG RULE ENDANGERS WOMEN'S HEALTH AND DEMOCRACY TAKE ACTION! (2001). PAI is a private non-profit organization, which advo-

A. *Organizations Subject to the Mexico City Policy*

Not all organizations are subject to the Global Gag Rule. The Global Gag Rule specifically targets foreign NGOs that receive funds through USAID for family planning programs.⁶⁴ Foreign NGOs that receive funding for non-family planning services are not subject to the Standard Clause of the Mexico City Policy, even though they may be providing family planning services.⁶⁵ Both the CRLP and the PAI interpret this to mean foreign NGOs receiving USAID funds for HIV/AIDS, child survival, and health assistance are exempt from the restrictions.⁶⁶

Other foreign NGOs which are exempt from the Mexico City Policy include those which: 1) have contracts with USAID for the sale of goods or services; 2) receive USAID funds through a sub-grant of a foreign host government; and 3) are closely affiliated with another NGO involved in abortion related activities but the two are legally separate entities or USAID has agreed to treat the two as separate entities.⁶⁷ NGOs based in the United States are also exempt, provided they do not channel the USAID funds to foreign NGOs.⁶⁸ In addition, foreign governmental organizations, such as hospitals and public universities, which provide abortion-related activities, are still eligible to receive USAID funds, with the only restriction being to keep the funds in a separate account.⁶⁹

cates population policies worldwide. See WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53.

64. 3 C.F.R. 873, 874 (2002); WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52, at 1.

65. 3 C.F.R. 873, 885 (2002); WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 1-2; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

66. President's Memorandum, Restoration of Mexico City Policy, 3 C.F.R. 873 (2002); WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 3; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52. If a foreign NGO begins receiving additional USAID funds specifically for family planning, then the standard clause will be implemented. See 3 C.F.R. 873, 885 (2002); WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 2; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

67. See 3 C.F.R. 873, 884-86 (2002); WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 3; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

68. See 3 C.F.R. 873, 874; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 3; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

69. See 3 C.F.R. 873, 885; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 4; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

B. *Family Planning Activities Prohibited by the Mexico City Policy*

Foremost, the Mexico City Policy prohibits foreign NGOs from performing "abortion as a method of family planning."⁷⁰ Abortion as a family planning method is defined by the Mexico City Policy as one for the purpose of spacing births.⁷¹ In accordance with the language of the Mexico City Policy, the CRLP interprets this restriction to mean USAID foreign NGO recipients may not perform an abortion when a woman's "physical or mental" health is endangered.⁷²

Another restriction in the policy is that an abortion is limited to "family planning" as defined in the President's memorandum.⁷³ The language of the Mexico City Policy includes a non-exhaustive list, which the CRLP interprets to prohibit speech and the promotion of public education, and/or legislation on abortion.⁷⁴ The CRLP also construes the restrictions to mean NGOs cannot publish factual information favoring abortion.⁷⁵ According to the CRLP the restrictions also prohibit NGOs from initiating public forums, demonstrations, marches or any media event regarding the decriminalization of abortion or regarding making abortion safe.⁷⁶ The language of the Mexico City Policy is not narrowly constructed; therefore, the CRLP concludes that expressions, discussions on the internet, or posting web-site information favoring abortion are likewise restricted.⁷⁷ Moreover, foreign NGOs are restricted from testifying before Congress

70. 3 C.F.R. 873, 880.

71. 3 C.F.R. 873, 877, 883. The definition of abortion as a method of family planning "includes, but is not limited to, abortions performed for the physical or mental health of the mother." *Id.* Additionally, the performance of abortion is defined as the operation of "a facility where abortions are performed as a method of family planning." *Id.*

72. *Id.*; CTR. FOR REPROD. LAW AND POLICY, THE BUSH GLOBAL GAG RULE: ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY, *in* THE GLOBAL GAG RULE ENDANGERS WOMEN'S HEALTH AND DEMOCRACY TAKE ACTION! (2001) [hereinafter ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY].

73. *See* 3 C.F.R. 873, 877.

74. *See* CTR. FOR REPROD. LAW AND POLICY, *supra* note 63.

75. *See id.*

76. *See id.*; *see also* CTR. FOR REPROD. RIGHTS, THE GLOBAL GAG RULE IS GLOBAL CENSORSHIP, *at* http://www.crlp.org/hill_ggr_lit_pk2.html (on file with The Scholar: St. Mary's Law Review on Minority Issues) [hereinafter THE GLOBAL GAG RULE IS GLOBAL CENSORSHIP]; Laura E. Asturias, *La Abusiva Mardaza de George W. Bush*, [George W. Bush's Arrogant Gag Rule], DIARIO SIGLO VEINTIUNO (GUATAMALA), August 4, 2001, *available at* <http://www.sigloxxi.com/cgi-bin/calciintiasp?codigo=k8deecol> (last visited Jan. 26, 2003), *translated in* http://www.crlp.org/hill_ggr_lit_guat.html (on file with The Scholar: St. Mary's Law Review on Minority Issues); ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY, *supra* note 72.

77. *See* CTR. FOR REPROD. LAW AND POLICY, *supra* note 63; *see also* THE GLOBAL GAG RULE IS GLOBAL CENSORSHIP, *supra* note 76; Asturias, *supra* note 76; ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY, *supra* note 72.

and cannot lobby United Nation's conferences to proclaim that abortion is an international human right.⁷⁸

Finally, the Mexico City Policy prohibits United States based NGOs and foreign NGOs from providing financial assistance to foreign NGOs who perform or promote abortion as a family planning method.⁷⁹ This includes the transfer of funds, goods, or services made available through USAID grants.⁸⁰

C. *Family Planning Services Permitted Under the Mexico City Policy*

Despite the many restrictions imposed by the Mexico City Policy, not all abortion-related activities are prohibited. Abortions performed in the case of rape, incest, or to save a woman whose life is threatened by carrying a fetus to full term are permitted.⁸¹ Consequently, the CRLP and PAI interpret the possession of medical abortion equipment and advice or referrals on abortion, under limited circumstances, as permissible under the Mexico City Policy.⁸²

Likewise, all post-abortion activities are exempt from Mexico City Policy restrictions, irrespective of the legality of the abortion.⁸³ Post-abortion activities include: 1) medical treatment; 2) counseling; 3) possession of medical post-abortion equipment; 4) post-abortion medical training; and 5) public campaigns and lobbying for reform of post-abortion care.⁸⁴

Additional abortion activities are permissible under the Mexico City Policy, including passive responses to questions about where to obtain a safe and legal abortion. Offering a response is appropriate if the question is asked by a woman who is already pregnant and satisfies other requirements.⁸⁵ The CRLP and PAI guidelines also list an allowance so that

78. See CTR. FOR REPROD. LAW AND POLICY, *supra* note 63; see also THE GLOBAL GAG RULE IS GLOBAL CENSORSHIP, *supra* note 76; Asturias, *supra* note 76; ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY, *supra* note 72.

79. See 3 C.F.R. 873, 874.

80. See *id.* at 874-78.

81. See *id.* at 877; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 5; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

82. See WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 5; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

83. See 3 C.F.R. 873, 877; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 2; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

84. See 3 C.F.R. 873, 884; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 5-8; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

85. 3 C.F.R. 873, 878 (responding passively, meaning that a family planning counselor candidly answers a pregnant woman's inquiry as to where she may obtain a safe and legal

employees of foreign NGOs may act individually, and personally advocate abortion as a family planning method.⁸⁶ Acquiring information on clients' abortion histories is also not a violation of the Mexico City Policy.⁸⁷ Lastly, general statistical information on abortion may be collected and disseminated as research without jeopardizing the NGO's USAID funding, provided the research is not used by the recipient NGO itself for lobbying purposes.⁸⁸ However, others may use the data collected to reform abortion laws.⁸⁹

D. *Auditing Recipients of USAID and Sanctions to Violators*

Recipients and sub-recipients of USAID funds agree any agent of USAID may perform an audit at any time.⁹⁰ Agents are authorized to interview recipient personnel and observe daily family planning operations of the recipient organization.⁹¹ Agents may also review reports, brochures, service statistics, financial statements, and other materials prepared by recipient and sub-recipient organizations.⁹²

If a violation is suspected, the recipient/sub-recipient organization must make available any other requested materials to the agent in order to make a more accurate determination of the violation in question.⁹³ Once the violation is confirmed, the sanctions depend on the type of violation.⁹⁴ Violations that are the result of a false certification result in the recipient being required to refund 100% of all funds received from USAID.⁹⁵

abortion, does not qualify as active promotion of abortion, provided that the woman has decided to have a legal abortion before posing the question to the counselor); WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

86. See 3 C.F.R. 873, 884; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 6; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

87. See WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 6–7; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

88. See 3 C.F.R. 873, 883 (stating that active promotion of abortion, prohibited by the Mexico City Policy, includes “lobbying a foreign government to legalize abortion”); WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 2; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

89. See 3 C.F.R. 873, 884; WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE RESTRICTIONS, *supra* note 53, at 7; WHAT ABORTION RELATED ACTIVITIES ARE STILL ALLOWED?, *supra* note 52.

90. 3 C.F.R. 873, 875, 880.

91. *Id.*

92. *Id.* at 880.

93. *Id.*

94. See *id.* at 875, 880.

95. *Id.* at 880.

V. THE CHILL FACTOR

Immediately after the Mexico City Policy was implemented, many foreign NGOs began to distance themselves from any abortion activity for fear they may lose funding from USAID.⁹⁶ Due to translation and interpretation difficulties, many foreign NGOs have halted all abortion related activities, even those the Mexico City Policy allows.⁹⁷ An example of the chilling effect is evident from an interview published in 1988.⁹⁸ The Population Crisis Committee questioned a Bangladesh clinic worker regarding the treatment or referral of women suffering from complications of a clandestine abortion.⁹⁹ In the interview, the clinic worker responded by stating "we can [not] do anything . . . she just has to go away."¹⁰⁰

This misinterpretation is compounded because the population crisis is largely concentrated in the Third World.¹⁰¹ While clinics funded by USAID have been successful in helping women create smaller families, it is feared this success will be hindered by the enforcement of the Mexico City Policy, as many clinics will no longer receive funding from USAID.¹⁰²

While many foreign NGOs have chosen to accept USAID and to comply with the restrictions of the Global Gag Rule, at least ten foreign NGOs, including the International Planned Parenthood Federation (IPPF), have been denied funding.¹⁰³ The Global Gag Rule has a "chilling effect" on NGOs who research, promote, or monitor abortion-related activities and their effects on women, thus hindering the information sharing process.¹⁰⁴

Restricting the speech of NGOs is detrimental to advances in human rights worldwide.¹⁰⁵ This is especially true in the context of the women affected by the Mexico City Policy. The majority of women affected by

96. Alyssa Rayman-Read, *The Sound of Silence*, AMERICAN PROSPECT, Oct. 1, 2001, at A21, available at 2001 WL 7681225.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Jim Motavalli, *The Gold Crush*, E, Nov. 1, 2001, available at 2001 WL 10327674.

102. *Id.*

103. Jim Lobe, *Health-U.S.: "Global Gag Rule" Faces Legal Challenge*, INTER PRESS SERVICE, June 6, 2001, available at 2001 WL 4804174.

104. Declaration of Aryeh Neier, Expert Aff. at 13, Ctr. for Reprod. Law and Policy v. Bush, No. 01 CIV. 4986(LAP) (S.D. N.Y. July 31, 2001).

105. Declaration of Kenneth Roth, Expert Aff. at 3, Ctr. for Reprod. Law and Policy v. Bush, No. 01 CIV. 4986(LAP) (S.D. N.Y. July 31, 2001); Declaration of Steven W. Sindling, Expert Aff. at 12-13, Ctr. for Reprod. Law and Policy v. Bush, No. 01 CIV. 4986(LAP) (S.D. N.Y. July 31, 2001).

this rule are poor women in the poorest countries whose strongest advocate in the global arena is the NGO. This is the same NGO whose voice is silenced by the Global Gag Rule.

VI. COUNTRIES AFFECTED

Fifty-nine countries currently receive funds from USAID.¹⁰⁶ Thirty-five of these countries legally allow abortion, yet they are still restricted from abortion-related activities inconsistent with the Global Gag Rule.¹⁰⁷ The Global Gag Rule makes no distinctions for countries where abortion is legal, thus leaving women who rely on NGO family-planning clinics with unequal access to reproductive health services. The remaining twenty-three countries have either very harsh anti-abortion laws or extremely restrictive legal abortion exceptions.¹⁰⁸ The women living in these countries are the ones most in need of abortion reform, which the Global Gag Rule prohibits. The following subsections will discuss specific countries affected by the Global Gag Rule, classified by the abortion laws in effect for each country.

A. *Countries Which Strictly Prohibit Abortion*

El Salvador is the smallest, poorest, and most densely populated country in Central America.¹⁰⁹ Presently, El Salvador is one of the countries in the world with the most restrictive abortion laws.¹¹⁰ It is the only USAID recipient country which strictly prohibits and penalizes abortion under any circumstance.¹¹¹ Coincidentally, El Salvador has the third highest maternal mortality rate in Latin America, 300 deaths per 100,000

106. CTR. FOR REPROD. LAW AND POLICY, THE GLOBAL GAG RULE'S EFFECT ON GAGGED COUNTRIES, in THE GLOBAL GAG RULE ENDANGERS WOMEN'S HEALTH AND DEMOCRACY TAKE ACTION! (2001) [hereinafter THE GLOBAL GAG RULE'S EFFECT ON GAGGED COUNTRIES]; see also OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., LAWS CONCERNING THE CIRCUMSTANCES UNDER WHICH ABORTION IS PERMITTED IN COUNTRIES RECEIVING FY 2001 USAID POPULATION ASSISTANCE (2001), http://www.planetwire.org/wrap/files.fcgi/1379_ABORTIONLAWS00.USAID.htm (last visited Apr. 2, 2003).

107. THE GLOBAL GAG RULE'S EFFECT ON GAGGED COUNTRIES, *supra* note 106; OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106 (listing thirty-five countries that allow abortions under certain circumstances).

108. THE GLOBAL GAG RULE'S EFFECT ON GAGGED COUNTRIES, *supra* note 106; OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106.

109. SOLEDAD VARELA, CTR. FOR REPROD. LAW AND POLICY, PERSECUTED: POLITICAL PROCESS AND ABORTION LEGISLATION IN EL SALVADOR: A HUMAN RIGHTS ANALYSIS 15 (CTR. FOR REPROD. LAW AND POLICY ed., 1999) [hereinafter PERSECUTED].

110. *Id.* at 11.

111. See *id.*; OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106.

women.¹¹² The leading causes of death among El Salvadorian women and adolescents are pregnancy and postpartum complications.¹¹³ The high maternal mortality rates in El Salvador are also attributed to the performance of unsafe abortions.¹¹⁴

The performance of unsafe abortions correlates to the high incidence of unplanned and unwanted pregnancies in El Salvador.¹¹⁵ The main reason why women end up pregnant when they do not want or plan to be pregnant is due to poor or nonexistent access to family planning services.¹¹⁶ While the majority of women in El Salvador know of the existence of contraceptives, less than half use any form of contraception.¹¹⁷ Another factor that may lead to pregnancy is the prevalence of sexual violence, which is one of the most common types of violence in El Salvador.¹¹⁸ In fact, a vast majority of the victims of sexual abuse are girls below the age of twenty.¹¹⁹ Incidentally, a study conducted over a sixteen-month period found the majority of women being prosecuted for abortion were under the age of twenty-four.¹²⁰ Seventeen of the forty-six women imprisoned were between the ages of twelve and nineteen; including one twelve-year old and two thirteen-year-old girls.¹²¹

The high incidents of violence against women coupled with the inadequate status of women's reproductive health make a dangerous and deadly combination that adversely affects the youngest and poorest women in El Salvador. These young women also have a high incidence of illiteracy and the majority of them live in rural areas.¹²² An estimated 25-40% of health care in rural populations is provided by NGOs.¹²³ While the illegality of abortion in El Salvador places all women in grave danger, those most severely affected are those living in rural areas primarily serviced by NGOs. El Salvador is a country whose current abortion policies are in need of legislative reform. However, the Global Gag Rule prohibits NGOs from lobbying a foreign government to liberalize abortion

112. See *PERSECUTED*, *supra* note 109, at 11, 87 n.9.

113. *Id.* at 18, 23 (stating that 80% of maternal mortality rate in 1995 was linked to pregnancy and showing pregnancy and postpartum complications to be the third most common cause of death among adolescents).

114. *Id.* at 25.

115. See *id.* at 23.

116. *Id.* at 23-24.

117. *Id.* at 23.

118. See *id.* at 22.

119. *Id.* at 22 (reporting that between December 1996 and February 1998 73.5% of the total number of female victims of sexual abuse were girls under the age of twenty).

120. *Id.* at 44, 46.

121. *Id.* at 46-47.

122. See *id.* at 21.

123. *Id.* at 19.

laws.¹²⁴ It is imperative that the prohibitions placed on NGOs by the Mexico City Policy be less restrictive. This will result in greater accessibility and use of family planning services as well as achieve reduced maternal mortality rates among women in El Salvador.

El Salvador is just one example of a country whose harsh anti-abortion laws combined with the Mexico City Policy restrictions, endanger the lives of many women. There are twenty-three USAID recipient countries that strictly prohibit abortion unless it is necessary to save the life of the woman.¹²⁵ Similar to the women living in El Salvador, the women living in these countries experience high rates of maternal mortality and unsafe abortion, which is further complicated by the imposition of the Mexico City Policy. The USAID recipient countries which legally permit abortion under this limited circumstance are: Yemen, Bangladesh, Benin, Uganda, Togo, Cote d'Ivoire, Dominican Republic, Tanzania, Senegal, Egypt, Guatemala, Philippines, Paraguay, Haiti, Honduras, Nigeria, Nicaragua, Indonesia, Mali, Malawi, Madagascar, and Kenya.¹²⁶

Exemplifying the plight of the women living in these twenty-three USAID recipient countries are the women of Kenya. In Western Kenya, the maternal mortality rate of women due to childbearing or pregnancy complications is 650 per 100,000 live births a year.¹²⁷ Thirty to fifty percent of maternal deaths are attributed to the performance of unsafe abortions.¹²⁸

Like women in El Salvador, it is the impoverished women in Kenya who are most affected by the Mexico City Policy—women like Alice Njoki. Alice sells fruit in Nairobi in order to support herself and her child.¹²⁹ Realizing that she can not afford another child, Alice has been

124. President's Memorandum, Restoration of the Mexico City Policy 3 C.F.R. 873, 878, 883 (2002). The Mexico City Policy explicitly excludes referrals for abortion in cases of rape, incest or to save the life of the mother as promotion of abortion. However, the policy is ambiguous on whether lobbying efforts to liberalize abortion laws in cases of rape, incest or to save the life of the mother as active promotion of abortion are permitted. See *id.*

125. OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106. Nepal was originally included in the category of countries which strictly prohibit abortion; however, the recent liberalization of Nepal's abortion laws justify the removal of Nepal from this category of countries. See *id.* (listing Nepal as a country which strictly prohibits abortion).

126. *Id.*

127. SHANNON CRINITI, PLANNED PARENTHOOD FED'N OF AM. INC., THE ROCKY ROAD TO SAFE MOTHERHOOD (2001), at <http://www.plannedparenthood.org/fpia/repkenya20011015.html> (last visited Apr. 2, 2003).

128. *Id.* (defining an unsafe abortion as termination of a pregnancy "performed by an unskilled person or in an environment lacking basic medical standards").

129. Ishbel Matheson, *Kenya Split over Bush Abortion Policy*, BBC NEWS, FEB. 23, 2002, at <http://news.bbc.co.uk/2/hi/africa/1837283.stm> (last visited Feb. 28, 2003).

receiving monthly contraceptive injections at a clinic in a slum of Nairobi.¹³⁰ At her last appointment however, Alice was informed that she could no longer receive family planning services at this clinic because they were closing at the end of the month.¹³¹ The clinic was one of five shut down in Kenya due to the Mexico City Policy restrictions.¹³² The clinic's director also reported the anticipation of closing eight clinics, thereby collapsing three-fourths of the organization.¹³³ Marie Stopes, another organization in Kenya, reported the closing of two clinics which primarily serviced poor women in the slums of Kenya and in Western Kenya.¹³⁴

In response to the closing of the clinic she relied on for family planning services, Alice stated, "I don't know what's going to happen now. I'm afraid I might get pregnant."¹³⁵ Clinic directors have the same fears for other women in Kenya losing access to family planning services. Directors state that the decrease in family planning services increases unwanted pregnancies and abortions.¹³⁶ Not only will these women lose access to affordable family planning services, but they will also lose health services such as breast and cervical cancer screening.¹³⁷

Pregnancy is a matter of life and death for the women who live in countries like Kenya. While abortion may not be a legal option for the majority of women living in these countries, it is one of the cheapest options for someone who feels like they may have no other alternative.¹³⁸ Despite the disparity between the abortion laws in Kenya and the United States, citizens in both countries are split on both sides of the abortion issue.¹³⁹ However, "[i]n America, abortion has become medically safe enough that it has evolved into an almost completely moral issue. In Kenya, abortions are so rampantly unsafe, that the death of the unborn fetus is the result of either serious injury or death of the mother."¹⁴⁰

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.* (reporting that "if you take away family planning services, the number of abortions goes up").

137. *Id.*

138. *See id.* (stating that with unwanted pregnancies some women end up having a dangerous illegal abortion because they do not have any alternative).

139. *See id.* (acknowledging that there is support of the Mexico City Policy by anti-abortionists in Kenya).

140. Josh Plotnik, Editorial, I'm Sayin', *America, Kenya and the Abortion Issue*, CORNELL DAILY SUN, Feb. 19, 2002 available at <http://www.cornelldailysun.com/articles/4656/> (last visited Feb. 28, 2003).

B. *Countries Which Permit Abortion in Very Limited Circumstances*

Even in countries with limited legal abortions, there are conflicts with the Global Gag Rule. Seventeen USAID recipient countries allow abortion when the health of the woman is at risk, and sometimes in cases of rape, incest or fetal defect.¹⁴¹ The USAID recipient countries which allow abortion under these limited circumstances are: Zimbabwe, Rwanda, Botswana, Burkina Faso, Bolivia, Peru, Mozambique, Cameroon, Ecuador, Morocco, Liberia, Eritrea, Ethiopia, Jordan, Jamaica, Ghana, and Guinea.¹⁴²

In Latin America and the Caribbean, Bolivia is the country with the highest maternal mortality rate, 416 deaths per every 100,000 births.¹⁴³ This is attributed to the fact abortion is a criminal offense in Bolivia, except in limited circumstances where judicial authorization can be obtained.¹⁴⁴ In Bolivia, an abortion may legally be obtained only if the mother's life is at risk, the pregnancy is a result of incest or rape, or if it is determined that the fetus is deformed.¹⁴⁵ Although abortion is permitted in these limited situations, the reality is that women of Bolivia experience great difficulty when attempting to obtain a legal and safe abortion.¹⁴⁶

Illustrating the obstacles women face when trying to obtain a safe legal abortion in Bolivia is the case of two teenaged sisters who became pregnant after they were raped by their father.¹⁴⁷ Even though the law permits abortion in cases of rape and incest, the two sisters encountered problems finding a judge who would preside over their case.¹⁴⁸ The first judge responsible for overseeing the case withdrew stating he was "incompetent to preside." The judge then transferred the case to a "family matters judge."¹⁴⁹ The family matters judge then transferred the case to

141. OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106.

142. *Id.*

143. JULIETA MONTANO, LATIN AM. AND CARIBBEAN COMM. FOR THE DEF. OF WOMEN'S RIGHTS, REPRODUCTIVE RIGHTS OF WOMEN IN BOLIVIA: A SHADOW REPORT 2 (CTR. FOR REPROD. LAW AND POLICY ed., 2001).

144. *Id.* at 2.

145. Korey Capozza, *Condemned to Die: Abortion in Latin America*, at <http://www.geocities.com/wellesley/3321/win15d.htm> (last visited Jan. 30, 2003) (commenting on Bolivia's abortion policies and noting that Korey Capozza is a journalist in Bolivia who writes "about contemporary political and social issues from a feminist perspective"); *see also* LATIN AM. AND CARIBBEAN COMM. FOR THE DEF. OF WOMEN'S RIGHTS, *supra* note 143, at 7.

146. Capozza, *supra* note 145; *see also* LATIN AM. AND CARIBBEAN COMM. FOR THE DEF. OF WOMEN'S RIGHTS, *supra* note 143, at 2 (noting that while abortion is legal in some situations, "as of 1999 only one legal abortion had ever been performed in Bolivia").

147. Capozza, *supra* note 145.

148. *Id.*

149. *Id.*

another family judge, reasoning he was disqualified due to his prior knowledge and opinions of the case.¹⁵⁰ The third judge reviewed the evidence and held that an abortion should be permitted; however, he did not authorize the abortion and subsequently transferred the case to the original presiding judge.¹⁵¹ These delays were disastrous for the two sisters, as they were so far advanced in their pregnancies that an abortion was medically impossible.¹⁵²

In addition to the difficulty of finding a judge who will preside over a case involving a request for an abortion, finding a doctor who will perform the legal abortion can be just as arduous. Such was the case of a 14 year old girl who was granted legal permission to obtain an abortion after a judge found she was pregnant as the result of a rape by her father.¹⁵³ Despite the judicial ruling in favor of the abortion, the doctors at the hospital refused to perform the procedure.¹⁵⁴ Fortunately, attorneys from *Centro Juana Azurday*, an NGO, obtained a legal order requiring a doctor to perform the abortion within twenty-four hours or face arrest for refusal to do so.¹⁵⁵ The hospital director, who was also a doctor, complied with the order and reluctantly performed the procedure.¹⁵⁶

The reluctance to permit or perform legal abortions is attributed to the powerful influence of the Catholic Church in Bolivia.¹⁵⁷ In the year 2000, an estimated 30,000 to 40,000 illegal abortions were performed in Bolivia.¹⁵⁸ In light of the fact that obtaining both permission and a doctor to perform a legal abortion in a timely manner is difficult, it is easy to understand why a woman might feel like her only alternative is to have an unsafe, illegal abortion.¹⁵⁹ It is tragic that young girls and women who are pregnant as the result of rape or incest are unable to easily obtain a safe abortion in a country which legally permits abortion in this circumstance.

Equally distressing is the idea that some women who obtain illegal abortions run the risk of being sexually violated during the procedure or face death due to severe bleeding and the inability to find a hospital or

150. *Id.*

151. *Id.*

152. *Id.*; see also LATIN AM. AND CARIBBEAN COMM. FOR THE DEF. OF WOMEN'S RIGHTS, *supra* note 143, at 8 (emphasizing that judges often resist in authorizing a valid abortion, thus making the required legal process for pregnant women degrading).

153. Capozza, *supra* note 145.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. LATIN AM. AND CARIBBEAN COMM. FOR THE DEF. OF WOMEN'S RIGHTS, *supra* note 143, at 2.

159. Capozza, *supra* note 145.

doctor who will provide post abortion care.¹⁶⁰ Unavailability of safe, legal abortions in Bolivia threaten the lives of women each year.¹⁶¹ These women are in need of an advocate to ensure that a viable alternative exists to unsafe abortions. There needs to be a place where women can have safe abortions and receive post abortion care if necessary. Fortunately, NGOs in Bolivia are lobbying the government regarding this women's health crisis.¹⁶² Nevertheless, the Global Gag Rule has forced many NGOs to withdraw their support from these lobbying efforts.¹⁶³ Even in countries such as Bolivia that allow abortion in very limited circumstances, the Global Gag rule conflicts with women's legal right to abortion.

C. *Countries in Which Abortion Is Legal*

The conflict with the Global Gag Rule, however, does not end when abortion is legalized. Abortion is legal in nineteen USAID recipient countries.¹⁶⁴ In India and Zambia, an abortion may be obtained to save the life of the woman, to save the woman's physical and mental health, or for socioeconomic reasons.¹⁶⁵ The following sixteen USAID recipient countries allow early abortion on request: Uzbekistan, Ukraine, Albania, Armenia, Azerbaijan, Tajikstan, Turkey, Turkmenistan, Cambodia, Georgia, South Africa, Russia, Kazakstan, Kyrgyz Republic, Russia, Romania, and Moldova.¹⁶⁶ The country most recently included in this category is Nepal. Nepal was originally listed as a USAID recipient that only permitted abortion to save the life of the woman.¹⁶⁷ However, an amendment of the Muluki Ain of 1963, the Civil Code of Nepal, legalized abortion under the following circumstances: 1) married women who have the consent of their husbands may abort within the first 12 weeks of pregnancy; 2) women who become pregnant as the result of rape or incest may abort within the first eighteen weeks of pregnancy; 3) if pregnancy

160. *Id.*

161. See LATIN AM. AND CARIBBEAN COMM. FOR THE DEF. OF WOMEN'S RIGHTS, *supra* note 143, at 7 (estimating "that 27% to 35% of maternal deaths are due to abortions performed under conditions of risk").

162. A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND THE U.S. CONSTITUTION, *supra* note 9.

163. *Id.*

164. OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106 (listing sixteen countries as permitting early abortion on request, two countries as permitting abortion "for socioeconomic reasons, also to save the woman's life, physical health and mental health"). The author is also including Nepal in this category as abortion is now legal in Nepal. *Women's Groups Hail Passage of Abortion Bill*, *supra* note 12.

165. *Id.*

166. *Id.*

167. *Id.*

presents a danger to the physical or mental health of the woman, she may abort; or 4) if there is medical proof that the fetus is damaged and would be born disabled, a woman may choose abortion.¹⁶⁸ Although abortion is legal in these countries, the Global Gag Rule still remains a threat to the availability of safe abortions for women these nations.

Note for example, a man's life expectancy in Nepal is longer than that of a Nepalese woman.¹⁶⁹ The maternal mortality rate in Nepal is 1,500 deaths per 100,000 live births, one of the highest maternal death rates in the world.¹⁷⁰ In comparison, a developed country, such as the United States, has only a 7 in 100,000 maternal mortality rate.¹⁷¹

Until recently, Nepal was a country in which abortion, under any circumstance, was illegal.¹⁷² As a result, unsafe abortions attributed to fifty percent of maternal deaths in Nepal.¹⁷³ On average, it is estimated that six women die daily in Nepal as the result of an unsafe abortion; additionally, several others are gravely injured or disabled.¹⁷⁴ Twenty percent of the women in Nepali prisons are incarcerated for having had an abortion.¹⁷⁵ In some cases the children of these imprisoned women live in jail with their mothers.¹⁷⁶

For instance, after learning she was pregnant with her fourth child, Goma Bogati felt she had no other choice but to terminate her pregnancy.¹⁷⁷ Goma ingested a bottle of animal medicine, and had her boyfriend apply pressure to her abdomen with a heavy rock.¹⁷⁸ Because she thought her efforts had failed to induce abortion, Goma began to walk to

168. Binaj Gurubacharya & Smriti Dhungel, *Abortion Likely to be "Legalized"*, KATHMANDU POST, Feb. 12, 2001, available at <http://www.nepalnews.com.np/contents/englishdaily/ktmpost/2001/feb/feb12/> (last visited Feb. 4, 2003) (noting the circumstances in which abortion has been legalized); *Women's Groups Hail Passage of Abortion Bill*, *supra* note 12 (commenting on the King's approval of the Eleventh Amendment Bill to the Civil Code authorizing abortion under limited circumstances).

169. See *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10.

170. See *id.*

171. See *id.*

172. See *id.*

173. See *id.*

174. See *id.*

175. Upadhyay, *supra* note 37; CTR. FOR REPROD. LAW & POLICY, *Roe v. Wade in the Global Context*, (2000) available at http://www.crlp.org/pub_fac_international.html (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (stating an estimated 25% of the women in prison in Nepal are incarcerated for having had abortions); Alyssa Rayman-Read, *How Pro-lifers Promote Death*, AM. PROSPECT, Oct. 1, 2001, at A23, 2001 WL 7681226 (stating that twenty percent of the women prison population is attributed to abortion or infanticide).

176. Upadhyay, *supra* note 37.

177. Rayman-Read, *supra* note 175.

178. *Id.*

the store to purchase more animal medicine.¹⁷⁹ The police found her on the side of the road where her fetus had been expelled as she hemorrhaged.¹⁸⁰ Goma Bogati and her three children, ages 10, 8, and 5 are inmates in a Nepali prison.¹⁸¹

Women can even be jailed for having a miscarriage as a result of receiving improper prenatal care.¹⁸² For example, Maya, who at the time was seven months pregnant, ingested pain relievers to lessen her frequent dizzy spells.¹⁸³ Thereafter, she miscarried and was accused of murdering her baby.¹⁸⁴ Maya was convicted of inducing an abortion, and sentenced to twenty years in prison.¹⁸⁵

In an effort to understand Nepal's predicament, on July 19, 2001, Congress allowed Dr. Nirmal K. Bista, Director General of the Family Planning Association of Nepal (FPAN),¹⁸⁶ to testify before the Senate Foreign Relations Committee regarding the effects of the Global Gag Rule in Nepal.¹⁸⁷ Dr. Bista testified that the Global Gag Rule has put FPAN and other NGOs in a serious dilemma.¹⁸⁸ The Nepalese Ministry of Health recently decided to try to decrease the high maternal mortality rate in their country by lobbying to liberalize the current abortion laws.¹⁸⁹ NGOs, led by FPAN, are participating in this campaign to decriminalize abortion.¹⁹⁰ But as a result of the Global Gag Rule, NGOs must make a terrible choice. They must choose between either speaking out and advocating the decriminalization of abortion in order to save women's lives, which puts NGOs' USAID funding in jeopardy or abiding by the restrictions of the Mexico City Policy and allowing women's lives to be adversely affected by Nepal's harsh abortion policies.¹⁹¹

Dr. Bista further testified that FPAN refused USAID, so it could continue to advocate for the decriminalization of abortion.¹⁹² FPAN gave up

179. *Id.*

180. *Id.*

181. *Id.*

182. Melanie Conklin, *The Gag Rule's Victims*, PROGRESSIVE, Aug. 1, 2001, available at 2001 WL 12185216.

183. *Id.*

184. *Id.*

185. *Id.* Maya's sentence was later reduced to a two years. *Id.*

186. FPAN, a member of the International Plan Parenthood Federation (IPPF), renders family planning services, as well as education, and counseling to the poor in Nepal. *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10.

187. *See Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10.

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.*

\$250,000 in USAID and will now face the closing of one or all of the reproductive health clinics in Nepal's most densely populated areas.¹⁹³ Overall, Nepal has lost over \$700,000 in funds that would have been used for family planning, contraceptive services and education on safe motherhood.¹⁹⁴

Nepal is not the only USAID recipient country that has lost funding. Other USAID recipient countries stand to lose considerable amounts of funds and desperately needed family planning services as well. In South Africa, a study has shown 35% of the maternal mortality rate is caused by unsafe, yet legal, abortions.¹⁹⁵ However, the more significant factor in maternal mortality rates is illness resulting from AIDS.¹⁹⁶ The Planned Parenthood Association of South Africa stands to lose \$600,000 in USAID funds because they provide family planning counseling, which includes information on abortion.¹⁹⁷ This results in a reduction of contraceptives for the women of South Africa, further increasing the risk of dying from sexually transmitted diseases such as AIDS.¹⁹⁸ Like South Africa, Cambodia also has a very high HIV infection rate which is greatly impacted by the Global Gag Rule.¹⁹⁹ Cambodia lost over \$3,000,000 which could have been used for sex education, counseling, and HIV prevention.²⁰⁰ The International Planned Parenthood Federation also listed

193. *See id.*

194. INT'L PLANNED PARENTHOOD FED'N, IMPACT OF THE GLOBAL GAG RULE, at <http://ippfen.com/files/26.doc> (last visited Feb. 13, 2003) [hereinafter IMPACT OF THE GLOBAL GAG RULE].

195. CTR. FOR REPROD. LAW AND POLICY & WOMEN'S HEALTH PROJECT OF THE CTR. FOR HEALTH POLICY, WOMEN'S REPRODUCTIVE RIGHTS IN SOUTH AFRICA: A SHADOW REPORT 8 (CTR. FOR REPROD. LAW AND POLICY ed., 1998) (showing that an initial national study indicated 35% maternal mortality rate due to abortion, however AIDS was also an increasing reason).

196. *See* "Mexico City" Policy's Effect on HIV/AIDS Likely to Come Up at UN Summit, BLUE SHEET, June 13, 2001, available at 2001 WL 7811387; CTR. FOR REPROD. LAW AND POLICY & WOMEN'S HEALTH PROJECT OF THE CTR. FOR HEALTH POLICY, *supra* note 195, at 8.

197. "Mexico City" Policy's Effect on HIV/AIDS Likely to Come up at UN Summit, *supra* note 196.

198. *See* CTR. FOR REPROD. LAW AND POLICY & WOMEN'S HEALTH PROJECT OF THE CTR. FOR HEALTH POLICY, *supra* note 195, at 7, 11 (discussing the use of contraceptives by South Africans and the high rate of HIV infection).

199. *Id.* at 11 (estimating that over 2.4 million South Africans tested positive for HIV in 1996); Katrina Anderson, *Lives on the Line: The Implication of the Global Gag Rule*, SAID IT, May 2001 available at <http://www.saidit.org/archives/may01/article1.html> (last visited Feb. 13, 2003) (listing Cambodia as having "the highest HIV infection rate in the world outside of sub-Saharan Africa").

200. IMPACT OF THE GLOBAL GAG RULE, *supra* note 194; INT'L PLANNED PARENTHOOD FED'N, HELD TO RANSOM (Jan. 22, 2002), available at

Albania as losing \$242,000, which would have provided women and adolescents with counseling and reproductive health services.²⁰¹

VII. THE MEXICO CITY POLICY AND INTERNATIONAL TREATIES

In addition to conflicting with the internal policies of developing nations, the Global Gag Rule conflicts with several international treaties and agreements. These international agreements can be divided into two categories; those which the United States have consented to promote and follow and those which it has refused to ratify.

A. *Treaties Ratified by the United States*

1. The United Nations Charter

As a member of the United Nations, the United States is obligated to follow the provisions of the UN charter. Article 55 of the United Nations Charter outlines theories and practices member nations should promote in an effort to create stability and amicable relations between nations.²⁰² The UN charter states that member nations should promote "social progress and development; solutions of international economic, social, health, and related problems."²⁰³ The charter further provides that promotion of aforementioned ideals should be done without discriminating on the basis of "race, sex, language, or religion."²⁰⁴

The Global Gag Rule violates Articles 55 and 56 of the United Nations Charter. It has a disparate impact on the social and developmental progress of women by prohibiting access to all forms of abortion information.²⁰⁵ It limits the ability of women in developing countries to be

som.org/gag_press.asp (last visited Feb. 11, 2003) (showing Cambodia has lost \$3,170,937 because of the Global Gag Rule).

201. IMPACT OF THE GLOBAL GAG RULE, *supra* note 194.

202. U.N. CHARTER art. 55 *reprinted in* THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE, at 130 (Carol E. Lockwood et al. eds., 1998). Article 55 reads in part, "[w]ith a view to the creation of conditions of stability and well-being that are necessary for peaceful and friendly relations among nations based on the respect of the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . ." *Id.* Under Article 56, countries that are members of the United Nations have agreed to actively promote the provisions described in Article 55. U.N. CHARTER art. 56, *supra*. Article 56 reads in its entirety, "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.*

203. U.N. CHARTER art. 55, *supra* note 202.

204. U.N. CHARTER art. 55, *supra* note 202 .

205. A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND THE U.S. CONSTITUTION, *supra* note 9 (stating "the United States cannot have it both ways—supporting women with one hand and silencing them with the other"). Further, the Global Gag Rule has not been successful in deterring abortion, and is therefore not a solution to an international

thoroughly informed about reproductive choices that may be legally and socially acceptable in their respective countries.²⁰⁶

2. Universal Declaration of Human Rights

In addition to the UN Charter, the Global Gag Rule is also in conflict with the Universal Declaration of Human Rights. The United States and other members of the United Nations signed the Universal Declaration of Human Rights in 1948.²⁰⁷ This declaration provides that “everyone has the right to a standard of living adequate for the health and well being of himself and his family, including. . . medical care and necessary social services.”²⁰⁸ Access to family planning programs is a necessary medical and social service, as it promotes the health and well being of women in developing countries. By eliminating access to family planning services and information, the Global Gag Rule denies women in developing countries access to information.

3. The International Covenant on Civil and Political Rights

Finally, the Global Gag Rule is in direct conflict with the International Covenant on Civil and Political Rights. The United States ratified this covenant in 1992.²⁰⁹ Under Article 19 of the International Covenant on Civil and Political Rights, “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”²¹⁰ By prohibiting NGOs from disseminating information about

health problem affecting women. Rayman-Read, *supra* note 96 (quoting the Population Crisis Committee which found “no evidence that the curtailment of services by AID-supported clinics reduced the number of abortions”).

206. A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND THE U.S. CONSTITUTION, *supra* note 9 (arguing the United States interference with foreign countries’ reproductive health policies infringes their national sovereignty); Anderson, *supra* note 199.

207. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *reprinted in* THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE, at 137 (Carol E. Lockwood et al. eds., 1998).

208. CTR. FOR REPROD. RIGHTS, INTERNATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH PROGRAMS: WHEN WILL THE U.S. GOVERNMENT FULFILL ITS COMMITMENTS? n.1 (2001) available at http://www.crlp.org/pub_art_intfamplan.html (last visited Apr. 2, 2003) [hereinafter WHEN WILL THE U.S. GOVERNMENT FULFILL ITS COMMITMENTS?] (citing UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 25 & 28).

209. *Id.*; see also Kristen D.A. Carpenter, *The International Covenant on Civil and Political Rights, A Toothless Tiger?*, 26 N.L. INT’L L. & COM. REG. 3, 5 (2000).

210. International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 19 para. 2, 999 U.N.T.S. 172, 178.

the full range of family planning alternatives,²¹¹ the Global Gag Rule restricts the right of women in developing countries to seek or receive information.²¹² The Global Gag Rule and its chilling effect on the ability to seek and receive information on abortion is a clear violation of the terms of the treaty. As a signatory of the treaty, the United States has a duty to follow its terms.

B. *Treaties Not Ratified by the United States*

The Global Gag Rule also conflicts with several other treaties that have yet to be ratified by the United States. When the Mexico City Policy was announced at the United Nations International Conference on Population in Mexico City, a delegation from the United States cited the United Nations Declaration of the Rights of the Child as support for the policy.²¹³ However, the Declaration of the Rights of the Child never states that the legal protections provided to children before birth are at all times superior to the rights of the mother and her reproductive choice.²¹⁴ Further, the United Nations has adopted more recent treaties dealing with the rights of children, such as the Convention on the Rights of the Child.²¹⁵ Although the Convention on the Rights of the Child has not been ratified by the United States, it too incorporates the provision of the Declaration of the Rights of the Child cited as support for the Mexico

211. See generally *Restoration of the Mexico City Policy*, 3 C.F.R. 873 (2002) (prohibiting the performance or promotion of abortion).

212. See International Covenant on Civil and Political Rights, *supra* note 210 (describing the rights one has to impart and receive information on ideas of all kinds). The Global Gag Rule prohibits NGOs from imparting specific information about abortion. Thus, women are unable to receive valid information regarding their reproductive rights.

213. *Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Dev.*, 670 F. Supp. 538, 540 (S.D.N.Y. 1987) (citing to the Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) Mexico, D.F., August 6-13, 1984)); *DKT Memorial Fund Ltd v. Agency for Int'l Dev.*, 887 F.2d 275, 276 (D.C. Cir. 1989) (citing to the Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) Mexico, D.F., August 6-13, 1984)). The relevant provision from the declaration states, "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959) *reprinted in* OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS at <http://www.whchr.ch/html/menu3/b125.html> (last visited Mar. 30, 2003).

214. See generally G.A. Res. 1386, *supra* note 213. Additionally, there was a great difference of the views on abortion in 1959 in comparison to 1984, apparent in the trend to legalize abortion in the United States in the seventies with the landmark case of *Roe v. Wade*. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

215. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 44.

City Policy.²¹⁶ Continued reliance on this provision alone as support of the Global Gag Rule, however, ignores several other provisions that directly conflict with the purpose of the Global Gag Rule.²¹⁷ Finally, the GGR violates various provisions of the International Covenant on Eco-

216. *Id.* at 45.

217. Several organizations, including the United Nations Population Fund, have categorized adolescents as individuals between the age of ten and nineteen. *See* CTR. FOR REPROD. RIGHTS, ADOLESCENTS NEED SAFE AND LEGAL ABORTION (2000) *available at* http://www.crlp.org/pub_fac_atkadol.html (last visited Feb. 24, 2003) (stating that the World Health Organization, the United Nations Children's Fund and the United Nations Population Fund issued a joint statement in 1988 categorizing adolescents). Globally, the majority of adolescents' pregnancies are unplanned. *See id.* The Convention on the Rights of the Child recognizes some children worldwide live in varying conditions and are in need of special care. Convention on the Rights of the Child, *supra* note 215, at 45. Many of the provisions set forth in this Convention mirror the articles set forth in the Convention on Social and Political Rights, but specifically apply to the stated rights of children. *Compare* Convention on the Rights of the Child, *supra* note 215 *with* International Covenant on Civil and Political Rights, *supra* note 210. Article 1 of the Convention on the Rights of the Child defines a child as a person below the age of eighteen years unless under the applicable law, majority is attained earlier. Convention on the Rights of the Child, *supra* note 215, at 46.

Article 13 of the Convention on the Rights of the Child states that the child has the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print . . . or through any other media of the child's choice." Convention on the Rights of the Child, *supra* note 215, at 48. The Global Gag Rule interferes with the right of children to freely receive and seek all forms of information regarding abortion because NGOs are restricted from speaking or publishing information about abortion as a family planning option. Convention on the Rights of the Child, *supra* note 215, at 48. Girls under the age of eighteen are physiologically capable of conception and should have access to all information regarding pregnancy and family planning.

Article 24 recognizes the right of children to have access to health care services. Convention on the Rights of the Child, art. 24, para. 1, *supra* note 215, at 52. The health care services to be provided by States would include the implementation of programs to reduce child mortality and develop family planning services. Convention on the Rights of the Child, art. 24, para. 2(a) & (f), *supra* note 215, at 52. The Global Gag Rule interferes with health care services for children because the loss of USAID funds has caused many clinics to shut down or face closure. *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10 (testifying that FPAN has refused USAID funds because of the restrictions imposed by the Global Gag Rule); Mexico City Policy: Effects of Restrictions, before the senate Foreign Relations Comm., 107th Cong. (2001) (statement of Daniel E. Pellegrum, President, Pathfinder International) (testifying that Bangladesh Rural Advancement Clinic has lost its USAID funding because it refuses to sign the Standard Clause of the Mexico City Policy) [hereinafter *Hearings*, statement of Daniel E. Pellegrum]. Moreover, in some USAID recipient countries unsafe abortions are a leading cause of child mortality. Therefore, the Global Gag Rule conflicts with the efforts to reduce child mortality rates in these countries. Further the Global Gag Rule does not encourage international cooperation and ignores the needs of developing countries in achieving the rights stated in Article 24. Convention on the Rights of the Child, art. 24, *supra* note 215, at 52.

monic, Social and Cultural Rights²¹⁸ and the Convention on the Elimination of All Forms of Discrimination Against Women.²¹⁹ Imposition of

218. The International Covenant on Economic, Social and Cultural Rights has many provisions which safeguard the basic human rights of women. WHEN WILL THE U.S. GOVERNMENT FULFILL ITS COMMITMENTS?, *supra* note 208. States who signed this convention recognize under Article 10(1), "the widest possible protection should be accorded to the family, which is the natural and fundamental group unit of society. . . ." International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, art. 10, para. 1, 993 U.N.T.S. 8. The "widest possible protection" should mean a woman is, at the very least, informed of all her reproductive options and, at most, not punished for her family planning choices. In developing nations, foreign NGOs play a huge role in educating women about family planning options and ensuring they are not punished for their reproductive choices. Proponents of the Global Gag Rule may argue the Mexico City Policy protects the establishment of the family, by preventing women from terminating the formation of a family. However, the effects of the Policy restrict protections for the establishment of a family due to the fact that many USAID recipient clinics have either been closed or face closure thereby making family planning services less accessible. *Hearings*, statement of Dr. Nirmal K. Bista, *supra* note 10 (testifying that FPAN has refused USAID funds because of the restrictions imposed by the Global Gag Rule); *Hearings*, statement of Daniel E. Pellegrum, *supra* note 217 (testifying that Bangladesh Rural Advancement Clinic has lost its USAID funding because it refuses to sign the Standard Clause of the Mexico City Policy).

Article 12 of the Covenant outlines the right to the "highest attainable standard of physical and mental health." Convention on the Rights of the Child, art. 12, *supra* note 215, at 52. Paragraph 2 of Article 12 further outlines affirmative action to be taken by State Parties to the Covenant to ensure this right. International Covenant on Economic, Social and Cultural Rights, art. 12 para. 2(a)-(d), *supra*. In addition, one provision calls for the assurance of all medical services and attention. International Covenant on Economic, Social and Cultural Rights, art. 12 para. 2(d), *supra*. The Mexico City Policy violates this Article in that it forces foreign NGOs to restrict the types of medical services they provide.

Article 15(1) asserts the right of individuals to benefit from scientific progress. International Covenant on Economic, Social and Cultural Rights, art. 15 para. 1(b), *supra*. Abortion is a medical service that has been carefully developed through the progress of science. As such, women should be allowed to benefit from this scientific advancement when making reproductive choices. Further, Article 15 calls for State Parties to respect the freedom of scientific research. International Covenant on Economic, Social and Cultural Rights, art. 15 para. 3, *supra*. In light of these provisions, the United States' enforcement of the Mexico City Policy violates the freedom of scientific research because it prohibits foreign NGOs from conducting research related to abortion.

219. Despite several attempts, the Convention on the Elimination of All Forms of Discrimination Against Women has not been ratified by the United States. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 922-24 (1996). Article 10(h) of CEDAW provides States Parties should take measures to prevent discrimination against women with respect to information which assists in the health of families, encompassing educational "information and advice on family planning." Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, art. 10(h), 1249 U.N.T.S. 18. The Global Gag Rule causes States Parties who have foreign NGOs receiving USAID to be in violation of Article 10 because they are unable to distribute, publish, or voice educational information that includes abortion information. Further, women are restricted from even receiving advice or referrals to family planning clinics which may provide them with this information. CEDAW also calls for

the GGR ignores important rights that are recognized and protected by these treaties. By failing to ratify these treaties and issuing a policy that directly conflicts with the rights recognized in them, the United States is undermining its credibility in the international community.

VIII. CHALLENGES TO THE MEXICO CITY POLICY

The new name given to the old rule is quite fitting and much more demonstrative of what the Mexico City Policy really means. The Global Gag Rule effectively “gags” foreign NGOs from speaking about abortion. The CRLP filed a lawsuit against President George W. Bush on June 6, 2001, arguing the Global Gag Rule violates the First and Fifth Amendments.²²⁰ The CRLP is not the first organization to challenge the Mexico City Policy on this basis.²²¹

States Parties to ensure access to health care, including family planning services. Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, art. 12 para. 1, 1249 U.N.T.S. 19. The Mexico City Policy is harmful to this Article in that women in rural areas are not provided with family planning services because their clinics have been shut down or are in danger of closing. Anderson, *supra* note 199 (discussing the loss of family planning services in Cambodia as affecting women in rural areas the most, because those are the areas that NGOs primarily service and where 80% of the nation's people reside). The restrictions of the Mexico City Policy hinder the ability of States Parties to fully ensure women's access to family planning and other health care services.

Article 16(1)(e) of the Convention of the Elimination of All Forms of Discrimination Against Women provides that women should have the same right as men to “decide freely and responsibly the number and spacing of their children.” Convention on the Elimination of All Forms of Discrimination Against Women, art. 16 para. 1(e), *supra*. Article 16 further provides women should have access to educational information to allow them to exercise this right. Convention on the Elimination of All Forms of Discrimination Against Women, art. 16 para. 1(e), *supra*. Although President George W. Bush may not agree with abortion as a means of child spacing in the United States, in some developing countries it is an acceptable means of family planning. OFFICE OF POPULATION, U.S. AGENCY FOR INT'L DEV., *supra* note 106 (listing USAID recipient countries in which abortion is legal). The family planning services offered by foreign NGOs are sometimes the only means available to women in certain parts of developing countries. See Anderson, *supra* note 199 (discussing the loss of family planning services as affecting women in rural Cambodia the most because that is the area that NGOs primarily service). The Mexico City Policy prohibits these women from freely exercising this right when these clinics are closed down or are required to restrict their services even though abortion is legally permitted.

220. See *Ctr. for Reprod. Law & Policy v. Bush*, No. 01 CIV.4986(LAP), 2001 WL 868007 (S.D.N.Y. July 31, 2001).

221. See *Pathfinder Fund v. Agency for Int'l Dev.*, 746 F. Supp. 192 (D.D.C. 1990); *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 691 F. Supp. 394 (D.D.C. 1988); *Planned Parenthood Fed'n of America v. Agency for Int'l Dev.*, 670 F. Supp. 538 (S.D.N.Y. 1987); *Alan Guttmacher Inst. v. McPherson*, 616 F. Supp. 195 (S.D.N.Y. 1985).

A. *Alan Guttmacher Institute v. Agency for International Aid*²²²

The Alan Guttmacher Institute (AGI), a private non-profit organization based in New York and Washington D.C.,²²³ was the first to challenge the Mexico City Policy in 1985.²²⁴ AGI filed a complaint against USAID in response to a 1983 denial of grant funding for its publication entitled *International Family Planning Perspectives* (*Perspectives*).²²⁵ Funding was denied following an audit by the Communications Review Board (CRB), which found *Perspectives* contained articles which possibly advocated abortion.²²⁶ While the initial complaint did not include a claim challenging the validity of the Mexico City Policy,²²⁷ AGI later sought to amend their complaint to include this cause of action.²²⁸ The court could not find a direct injury to AGI caused by the policy since it had not been applied to domestic NGOs; therefore, the motion to amend was denied due to lack of ripeness.²²⁹

222. *Alan Guttmacher Inst. v. McPherson*, 616 F. Supp. 195 (S.D.N.Y. 1985).

223. *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1532 (S.D.N.Y. 1984); THE ALAN GUTTMACHER INSTITUTE, FREQUENTLY ASKED QUESTIONS (2002), available at <http://www.agi-usa.org/about/faq.html> (last visited Mar. 9, 2003). See also THE ALAN GUTTMACHER INSTITUTE, ABOUT AGI (2002), available at <http://www.agi-usa.org/about/index.html> (last visited Mar. 9, 2003) (describing basic information about the organization).

224. See *Alan Guttmacher Inst. v. McPherson*, 616 F. Supp. at 209 (seeking to amend the complaint to challenge the constitutionality of 22 U.S.C. § 2151b(f)(1)).

225. *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1532 (S.D.N.Y. 1984). *Perspectives* published materials dealing with international population control and family planning; it received funding from USAID for almost ten years prior to the 1984 denial. See *id.*

226. *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1532-33 (S.D.N.Y. 1984).

227. *Id.* at 1533. The complaint included the following five allegations: 1) the denial of funding based on ideas published by AGI violated the First Amendment; 2) the denial of funding based on content violated the First and Fifth Amendments; 3) the denial of funding violated the Foreign Assistance Act of 1961; 4) the denial of funding without a proper hearing was a deprivation of property in violation of the Fifth Amendment; and 5) the denial of funding was "arbitrary and capricious" violating the Administrative Procedure Act (APA). See *id.* at 1533. The court dismissed the fifth cause of action finding review under the APA to be inappropriate due to the broad language of the statute and the subjectivity involved in dispersing an agency's limited funds. See *id.* at 1536-37. The court also dismissed the fourth claim holding that the expectancy to receive funds does not constitute a property interest in FAA funds. See *id.* at 1543-45. Additionally, the court held that the doctrine of sovereign immunity applied to the affirmative injunctive relief sought by AGI, but not to any declaratory relief; therefore the suit was not entirely dismissed. See *id.* at 1537-42.

228. See *Alan Guttmacher Inst. v. McPherson*, 616 F. Supp. at 209.

229. See *id.* at 210-12. The three remaining causes of action were decided on June 17, 1985. See generally *id.* In regards to the claim that the denial of funding constituted "content-based" discrimination thus violating the First and Fifth amendments the court stated that a retroactive prohibition of "neutral articles threatens to inhibit that free expression of

B. *DKT Memorial Fund Ltd. v. Agency for International Development*²³⁰

The second attack on the Global Gag Rule was lead by a domestic NGO, DKT Memorial Fund.²³¹ Additionally, two foreign NGOs, Parivar Seva Sanstha and Population Services Family Planning Programmes Ltd., were co-plaintiffs in the suit.²³² All three plaintiffs assisted and/or engaged in family planning services that provided access to voluntary abortions and dispersed general information regarding abortion and the accessibility of abortion.²³³ DKT Memorial Fund petitioned the Court for injunctive relief against the enforcement of the Mexico City policy.²³⁴ The district court had originally held the plaintiffs lacked standing due to a failure to show injury in fact.²³⁵ However, the appellate court allowed the plaintiffs to amend the petition and reversed and remanded the case to the district court.²³⁶

On remand, the court addressed the standing issue once more and found all plaintiffs met the standing requirements.²³⁷ In regards to the

ideas which lies at the heart of the First Amendment.” *See id.* at 206. However, the court held that the settlement offered by the government which offered not to retroactively consider the two articles mooted the constitutionality question in this case. *See id.* *See generally* Alan Guttmacher Inst. v. McPherson 805 F.2d 1088 (2d Cir. 1986) (modifying in part and affirming the holding in Alan Guttmacher Inst. v. McPherson 616 F. Supp. 195 (S.D.N.Y. 1985)).

230. *DKT Memorial Fund Ltd. v. Agency for Int’l Dev.*, 691 F. Supp 394 (D.D.C. 1988).

231. *Id.* at 396.

232. *Id.* The complaint alleged the Mexico City Policy: 1) contradicted and overreached the Foreign Assistance Act of 1961 and the Continuing Appropriations Act of 1985; 2) violated the First and Fifth Amendments; and 3) “is arbitrary and capricious under the Administrative Procedure Act.” *Id.* at 395.

233. *Id.* at 396. None of the plaintiffs had ever previously applied for USAID benefits, however they planned to apply for funds to be used in a future joint project. *Id.* at 396-97.

234. *Id.* at 395.

235. *Id.* at 397.

236. *Id.* When the plaintiffs amended their complaint to state, “[b]ut for the abortion eligibility policy, plaintiffs would be eligible to apply and to compete for and, if successful, to receive [US]AID funds,” defendants had the burden of proving that the plaintiffs were ineligible for AID funds. *Id.* at 398. The defendants did not meet their burden, summary judgment was not permitted, and the complaint survived. *Id.* at 398.

237. *Id.* at 400 (citing *Cardenas v. State*, 733 F.2d 909, 913 (D.C. Cir. 1984)). The court found DKT Memorial Fund could show a direct injury caused by the Mexico City Policy and a favorable decision could redress their injury; therefore, DKT Memorial Fund met the standing requirement. *Id.* at 399. With regard to the two foreign NGOs involved in the suit, the government asserted a lack of standing based on their non-resident alien status. *Id.* at 399. However, the Court pointed out that in *Cardenas v. Smith*, the more relevant issue for standing under Article III is the injury, as opposed to the party’s identity. *Id.* at

allegation that the Mexico City Policy is inconsistent with the Foreign Assistance Act of 1961, the Court held the legislative history illustrates Congress' intent to allow the President to use his discretion in awarding USAID funds.²³⁸ Further, the court held the Mexico City Policy was not overreaching in regards to other provisions in the Foreign Assistance Act of 1961.²³⁹

For the second claim, involving a First Amendment violation, the Court found USAID was "indirectly doing what it cannot do directly," to the domestic plaintiff, DKT Memorial Fund.²⁴⁰ The court cited *Speiser v. Randall*, which held that even though the government has the right to withhold a government benefit, it may not do so on a basis which "infringes [a] constitutionally protected interest—especially, [the] interest in freedom of speech."²⁴¹ Further, the Mexico City Policy's resulting standard clause does not meet the time, place, or manner test set forth in *Consolidated Edison Co. v. Public Service*.²⁴² The court also quotes the fact that the "time, place, or manner restrictions may not be based on subject matter or content of speech."²⁴³ The court ultimately found the standard clause to be a violation of DKT's First Amendment rights.²⁴⁴ However, this successful attack on the Mexico City Policy was short lived as the Court of Appeals reversed the district court ruling and remanded for dismissal.²⁴⁵

C. *Planned Parenthood Federation of America, Inc. v. Agency for International Development*²⁴⁶

In January 1987, a third lawsuit was filed challenging the constitutionality of the Mexico City Policy.²⁴⁷ The suit was initiated by Planned

399. The Court found the two foreign NGOs have shown an injury in fact that can be redressed by a favorable decision by this Court; therefore, they have standing. *Id.* at 400.

238. *Id.* at 402.

239. *Id.* at 403.

240. *Id.* at 404.

241. *Id.* (citing 357 U.S. 513, 526).

242. *Id.* (citing 447 U.S. 530, 535).

243. *Id.* at 405 (citing 447 U.S. 530, 535).

244. *Id.* However, the Court found the foreign plaintiffs lacked standing to bring a violation of Constitutional rights claim. *Id.* at 405-06.

245. See generally *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989).

246. 670 F. Supp. 538 (1987).

247. *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 670 F. Supp. at 541. In addition, the PPFA petitioned the Court to invalidate the Standard Clause, issue an injunction against the use of the Standard Clause, and issue an injunction against the consideration of PPFA's position on abortion as a determinative factor when making funding decisions. *Id.* The complaint alleged: 1) violation of freedom of speech and assembly under the First Amendment; 2) violation of privacy rights of recipients of family planning

Parenthood Federation of America, Inc. (PPFA), a domestic NGO which provides family planning funds to foreign NGOs in furtherance of its mission.²⁴⁸ The district court dismissed the case for failure to state a claim for which relief could be granted²⁴⁹ and held that justiciability limits prevented review of the constitutional issues because it was a political question.²⁵⁰ In essence, the entire complaint was dismissed and the attack against the Mexico City Policy failed.²⁵¹

D. *Pathfinder Fund. v Agency for International Development*²⁵²

The fourth attack on the Mexico City Policy was led by the Pathfinder Fund, the Association for Voluntary Surgical Contraception, Inc., and the Population Council; three domestic NGOs which aid international family planning projects.²⁵³ The issue before the district court in this case was whether the Eligibility Clause of the Mexico City Policy violated the First Amendment right of domestic NGOs to associate with foreign NGOs on

information; 3) USAID lacks authority to implement the Standard Clause on grant recipients; 4) the implementation of the Policy is a violation of the Administrative Procedure Act; and 5) the adoption of the clause is a violation of due process under the fifth amendment. *Id.*

248. *Id.* Included in the mission of PPFA is the assistance of "organizations in developing countries to increase access to voluntary fertility regulations services, including legal abortion, through information and education, provision of medical services, commodity distribution and lobbying." *Id.* This lawsuit also consisted of other plaintiffs suing as individuals and as a class. *Id.* All of the individual plaintiffs are citizens of the United States. *Id.*

249. *Id.* at 545. Plaintiffs asserted the language of sections 2151(a) and 2151u(a) of the Foreign Assistance Act (FAA) limit the Executive's authority to implement the Mexico City Policy. *Id.* at 542. The Court followed Judge Haight's reasoning in *Alan Guttmacher Institute v. McPherson*, 616 F. Supp. 195 (S.D.N.Y. 1985), *aff'd*, 805 F.2d 1088 (2d Cir. 1986), and found these sections of the FAA did not prohibit the President from implementing the Mexico City Policy. *Id.* at 543. After reviewing the legislative history, the court concluded it was the intent of Congress to leave the issue "in the hands of the Executive" and therefore dismissed the Plaintiffs' assertion of Executive limitations. *Id.* at 544-45.

250. *Id.* at 547. The first and second causes of action were dismissed as the court found them to be an inquiry into the President's power to institute foreign policy, which is a political question the courts are not equipped to assess. *Id.*

251. *Id.* at 550. The appellate court agreed that the President was acting within his authority in implementing the Mexico City Policy. *See* *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 655 (2d Cir. 1988). However, the appellate court did not agree that the constitutional challenge presented a non-justiciable political question and therefore reversed and remanded. *See* *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d at 656. On remand the entire action was dismissed. *See* *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, available at 1990 WL 26306 (S.D.N.Y. 1990), *aff'd*, 915 F.2d 59 (2d Cir. 1990).

252. 746 F. Supp. 192 (D.D.C. 1990).

253. *Pathfinder Fund v. Agency for Int'l Dev.*, 746 F. Supp. 192, 194 (D.D.C. 1990).

projects related to abortion.²⁵⁴ The court first had to determine to what degree the state action interfered with domestic NGOs ability to associate with foreign NGOs.²⁵⁵ The court found that the plaintiffs' right to associate with foreign NGOs was not substantially burdened by the Eligibility Clause and reviewed the Clause using the rational basis test.²⁵⁶ Ultimately, the Court held the Eligibility Clause was "rationally related to a legitimate government interest," entered summary judgment for the defendant and dismissed the complaint.²⁵⁷

E. *The Center for Reproductive Law & Policy v. George W. Bush*²⁵⁸

The most recent challenge to the Mexico City Policy was initiated by the Center for Reproductive Law & Policy (CRLP) on June 6, 2001.²⁵⁹ The CRLP actively promotes reproductive rights as human rights and advocates for global abortion reform in collaboration with foreign NGOs.²⁶⁰ The complaint alleged the Mexico City Policy and its implementing clauses were in violation of the constitution and customary international law.²⁶¹ However, the court did not decide the merits of the case because

254. *Id.* This suit was originally filed as a challenge to 1) the statutory authority for the implementation of the Mexico City Policy; and 2) the constitutionality of the Mexico City Policy. *Id.* However, the district court issued a stay until the Court of Appeals rendered a decision in *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989), a case dealing with the same issue. *Id.* The court commented that *DKT Memorial Fund* did not answer the issue of whether organizations have a right to associate with other organizations under the First Amendment, and later allowed the Plaintiffs in this case an opportunity to amend their complaint in order to rule on the issue. *Id.*

255. *Id.* at 195-96. The government's actions would be reviewed under the highest level of scrutiny if the court found that the Eligibility Clause "directly and substantially interferes with plaintiffs' ability to associate with foreign NGOs." *Id.* at 196.

256. *Id.* at 198-99. The court commented that the plaintiffs' right to associate with foreign nationals is not absolute and the Clause only prevented "plaintiffs from associating with their pick of foreign NGOs." *Id.* at 199.

257. *Id.*

258. No. 01 CIV.4986(LAP), 2001 WL 868007 (S.D.N.Y. Jul. 31, 2001).

259. *See Id.* at *2. Other individual plaintiffs included staff attorneys for CRLP. *Id.*

260. *Id.* Interestingly, the plaintiffs have never received nor intend to apply for USAID funds. *Id.*

261. *Id.* at *3. The defendants requested dismissal on three bases: 1) the plaintiffs lack standing; 2) the suit is not ripe; and 3) the plaintiffs have failed to state a claim for which relief can be granted. *Id.*

the court found that the Plaintiffs lacked standing.²⁶² Therefore, the entire action was dismissed.²⁶³

Yet, when reviewed at the appellate level, the court did address the merits of the case without addressing the standing issue.²⁶⁴ Regarding the First Amendment claim, the court relied on their decision in *Planned Parenthood Federation of America, Inc. v. Agency for International Development* as controlling authority and held there was no constitutional violation and dismissed the claim.²⁶⁵ The CRLP also claimed that the vague language of the Mexico City Policy failed to give sufficient notice as to what speech and activities were specifically prohibited, thus violating the Due Process Clause.²⁶⁶ The Court found that this claim relied on the rights of the foreign NGOs and therefore dismissed this claim “for lack of prudential standing.”²⁶⁷ The Plaintiffs further alleged a Fifth Amendment Equal Protection violation stating that the Mexico City Policy restrictions prevented them from competing on an equal basis with domestic anti-abortion organizations.²⁶⁸ Although the Court found the plaintiffs to have standing to bring this claim, it dismissed this claim for lack of merit.²⁶⁹

262. *Id.* at *5-12. In analyzing the defendant’s request for dismissal based on a lack of standing, the Court found the plaintiffs failed to show a concrete demonstrable injury in fact. *Id.* at *8-9. The Court further found a failure to show a causal connection to a claim of injury caused by the government. *Id.* at *11-12. The Court also found, even had there been an injury, the Court could not properly offer redress, and therefore plaintiffs failed in all elements of standing. *Id.* at *12.

263. *Id.* at *12.

264. *Ctr. for Reprod. Law and Policy v. Bush*, 304 F.3d 183, 192-95 (2d Cir. 2002). The Court held that where the constitutionality of a governmental regulation is challenged, “and a controlling decision of this court has already entertained and rejected the same constitutional challenge to the same provision, the Court may dispose of the case on the merits without addressing a novel question of jurisdiction.” *See id.* (relying on *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-101 (1998), in which the Supreme Court recognized an exception to deciding on the issue of standing prior to ruling on the merits in a case when there is already a controlling case which has decided the merits issue).

265. *Id.* at 190-91 (relying on *Planned Parenthood of Am., Inc., v. Agency for Int’l Dev.*, 915 F.2d 59 (2d Cir. 1990)).

266. *Id.* at 188.

267. *Id.* at 196. Under the doctrine of prudential standing, “a court must ask whether a plaintiff’s claim rests on the legal rights of a third party, asserts only a generalized grievance, or asserts a claim that falls outside the zone of interests protected by the legal provision invoked.” *Id.* The court addressed the standing issue in this claim because the *Planned Parenthood* case did not involve a Due Process claim in this context. *Id.* at 195.

268. *Id.* at 188.

269. *Id.* at 197-98. The court used a rational basis test to review the Equal Protection claim finding that the classification was not suspect nor did it infringe a fundamental right. *Id.* at 197. Without much analysis the court relied on *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991), a case in which the Supreme Court held that the government may use public funds to favor “the anti-abortion position over the pro-choice position.” *Id.* at 198.

In summary, all of the challenges to the Mexico City Policy have failed. Due to standing requirements and justiciability limits of the courts it is unlikely that a domestic or foreign NGO will find the relief they seek in the courts. However, Congress has the ability to remedy the injustices brought about by the Global Gag Rule.

IX. PROPOSAL

Many members of Congress are in favor of repealing the Global Gag Rule; they recognize the fact the rule does not protect women from human rights abuses in family planning, but instead ignores the hardships faced by women in developing countries.²⁷⁰ The first step in repealing the Global Gag Rule is to limit the President's authority to implement the policy. Several of the attacks on the Global Gag Rule included challenges to the authority of the President to limit the granting of USAID funds to organizations which did not conduct abortion related activities.²⁷¹ However, in each case the courts found that Congress intended for the President to have discretion in the allocation of USAID funds.²⁷² Thus, Congress must take affirmative steps to limit the President's authority to implement the Mexico City Policy.

In 1985, both Congress and the House attempted to impede the President's ability to deny USAID funds to NGOs based on the abortion re-

270. See generally Tara A. Gellman, *The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, the UNFPA and Family Planning in the P.R.C.*, 17 N.Y.L. SCH. J. HUM. RTS. 1063, 1094 (2001).

271. See generally *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1533-34 (S.D.N.Y. 1984) (claiming the termination of funding violated the Administrative Procedure Act (APA). Review under the APA is appropriate unless expressly prohibited by statute or the "challenged decision is one committed to agency discretion by law."); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 691 F. Supp. 394, 401 (D.D.C. 1988) (challenging the legality of the Mexico City Policy); *Planned Parenthood Fed'n of Am. v. Agency for Int'l Dev.*, 670 F. Supp. 538 (S.D.N.Y. 1987) (claiming the Mexico City Policy violated the statutory authority of the Foreign Assistance Act).

272. See *Alan Guttmacher Institute v. McPherson*, 597 F. Supp. at 1534-37 (holding that 22 U.S.C. § 2151(b) authorizes the President "to furnish assistance, on such terms and conditions as he may determine" and that Congress did not intend review of funding decisions under this statute); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 691 F. Supp. at 401 (citing the authority of the President under 22 U.S.C. § 2151b(b) of the FAA to "to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning" and noting that although both Congress and the House had the opportunity to limit the President's discretion the proposals were dropped); *Planned Parenthood Fed'n of Am. v. Agency for Int'l Dev.*, 670 F. Supp. at 542-545 (concluding that 22 U.S.C. § 2151b(b) of the FAA grants the authority to the President to distribute funds "on such terms and conditions as he may require" and that Congress "has not chosen to interfere with Executive discretion in that arena").

lated activities they promote.²⁷³ The proposed amendment to the FAA by the House would “prohibit the president from denying population planning assistance funds to any country or organization because of the types of voluntary and non-coercive family planning programs which it carries out or promotes, or for which it provides funds, goods, or services, so long as it does so entirely with funds other than the funds made available by the United States under this part.”²⁷⁴ The House bill directed that the Administrator of USAID “shall not subject any non-governmental or multilateral organization to any requirement more restrictive than any requirement applicable to a foreign government for such assistance.”²⁷⁵ Unfortunately, in conference both bills were dropped and the President’s broad discretion remained intact.²⁷⁶ Recently, the Senate Foreign Relations Committee in July 2001 approved the Global Democracy Promotion Act, sponsored by Senators Barbara Boxer and Olympia Snowe.²⁷⁷ The Global Democracy Promotion Act contains two provisions which guarantee United States foreign policy is compatible with human rights.²⁷⁸ The Act prohibits the denial of funding to foreign NGOs “based on the medical services they provide.”²⁷⁹ In addition, foreign NGOs cannot be forced to relinquish their rights to free speech and assembly in exchange for federal funding.²⁸⁰

The Global Gag Rule violates the first of these provisions because it denies foreign NGOs aid on the basis of services they provide with their own resources.²⁸¹ Additionally, the Global Gag Rule violates the second

273. See DKT Mem’l Fund Ltd v. Agency for Int’l Dev., 691 F. Supp. at 402 n.11 (citing H.R. 1555, 99th Cong., 1st Sess. § 304(a) (1985); H.R. REP. NO. 39, 99th Cong., 1st Sess. 37-38 (1985); S. 960, 99th Cong., 1st Sess. § 303(b) (1985); S. REP. NO. 34, 99th Cong., 1st Sess. 32 (1985)).

274. See DKT Mem’l Fund Ltd v. Agency for Int’l Dev., 691 F. Supp. at 402 n.11 (citing H.R. 1555, 99th Cong., 1st Sess. § 304(a) (1985); H.R. REP. NO. 39, 99th Cong., 1st Sess. 37-38 (1985)).

275. See DKT Mem’l Fund Ltd v. Agency for Int’l Dev., 691 F. Supp. at 402 (citing S. 960, 99th Cong., 1st Sess. § 303(b) (1985); S. REP. NO. 34, 99th Cong., 1st Sess. 32 (1985)).

276. See DKT Mem’l Fund Ltd v. Agency for Int’l Dev., 691 F. Supp. at 402.

277. See Global Democracy Promotion Act of 2001, S. 367, 107th Cong. (2001). See also Jan Erickson, *Reproductive Rights Gains, Losses*, NAT’L NOW TIMES, Oct. 1, 2001, Vol. 33, Issue 3 at 11, available at 2001 WL 11283974.

278. Global Democracy Promotion Act of 2001, S. 367, 107th Cong. § 3 (1) (2001). *Mexico City Policy: Effects of Restrictions: Testimony Before the Senate Foreign Relations Comm.*, 107th Cong. (2001) (statement of Aryeh Neier, President, Open Society Inst.) [hereinafter *Hearings*, statement of Aryeh Neier].

279. Erickson, *supra* note 277.

280. Global Democracy Promotion Act of 2001, S. 367, 107th Cong. § 3(2)(2001); Erickson, *supra* note 277.

281. See generally President’s Memorandum on the Restoration of the Mexico City Policy, 3 C.F.R. 873 (2002) (restoring a policy in which foreign non-governmental organizations were required to “agree as a condition of their receipt of federal funds for family

provision because recipient organizations must first sign the Standard Clause prior to receiving funds, stating they will not “promote” abortion as a family planning method.²⁸² Under the Mexico City Policy, promotion of abortion includes speech, printed information, verbal advice, public forums and lobbying of governments to change current abortion policies.²⁸³ The House of Representatives’ Appropriations Committee also passed a bill containing the same language as the Senate bill and included it in the Global Democracy Promotion Act.²⁸⁴ However, the House bill was dropped as a compromise to secure funding for United Nations Fund for Population Assistance (UNFPA).²⁸⁵ The Global Democracy Promotion Act presented by the Senate remains on the calendar unaffected by the House bill because it was introduced as a stand alone bill.²⁸⁶

Legislative efforts to repeal the Mexico City Policy by limiting the President’s authority to place such restrictions on foreign NGOs should be supported. The initial reform of foreign assistance programs under President John F. Kennedy’s administration supported legislation which was less restrictive on USAID recipients.²⁸⁷ USAID was created as a foreign assistance program free from the political functions of its predecessors, in an attempt to better assist the developing nations of the world.²⁸⁸ The Mexico City Policy restricts USAID resources and allows politics to hinder the developmental purpose of the organization.

The Executive has too much power to dramatically affect the family planning options of women in developing countries from one day to the next. This problem is evident in the history of the Mexico City Policy,

planning activities that such organizations would neither perform nor actively promote abortion as a method of family planning in other nations.”); *Hearings*, statement of Aryeh Neier, *supra* note 278.

282. *See* 3 C.F.R. 873, 874-75.

283. *See id.* at 877-78 (2002).

284. *Compare* Global Democracy Promotion Act of 2001, H.R. 755, 107th Cong. (2001) with Global Democracy Promotion Act of 2001, S. 367, 107th Cong. (2001); *see* Erickson, *supra* note 277.

285. H.R. Rep. No. 107-57, at 2 (2001), *available at* 2001 WL 470730 (listing the Global Democracy Promotion Act of 2001 in the table of contents yet dropped from the legislative history and the House bill due to the compromise); POPULATION COMPLACENCY ALERT, FED VOTES AGAINST FAMILY PLANNING, *at* http://www.geocities.com/population_alert/fed_votes.htm (last modified Feb. 4, 2003). Despite the immense sacrifice made by supporters of the Global Democracy Promotion Act, President Bush did not fund UNFPA. POPULATION COMPLACENCY ALERT, *supra*.

286. H.R. Rep. No. 107-57 (2001); *see* CTR. FOR REPROD. RIGHTS, HOUSE RETAINS BUSH GLOBAL GAG RULE (2001), *at* http://www.reproductiverights.org/pr_01_0516ggr_vote.html (last visited Mar. 27, 2003).

287. *See* U.S. AGENCY FOR INT’L DEV., *supra* note 18.

288. *See id.*

created and maintained by Republican Presidents, repealed by a Democrat President, then reinstated by a Republican President.²⁸⁹ The rights of women in developing countries should not hang in the balance of the religious beliefs of one man which are in conflict with the legal rights enjoyed by American women. Further, a repeal of the Mexico City Policy would effectively make the United States foreign policy similar to our domestic policy and case law regarding the use of government funds for family planning services.²⁹⁰

Due to the nature of our legislative process and the struggle between the Democrat and the Republican parties to get legislation passed which meets favorably with both parties, it is unrealistic the complete repeal of the Mexico City Policy will pass. Therefore, this comment proposes a compromise—the partial repeal of the Mexico City Policy with the harshest effect.

The Mexico City Policy most harms those countries which have anti-abortion laws that either completely forbid abortion under any circumstances or allow it in very limited circumstances. According to the PAI

289. President's Memorandum, Restoration of the Mexico City Policy, 3 C.F.R. 873, 873 (2002).

290. See generally *Rust v. Sullivan*, 500 U.S. 173 (1990) (upholding a statutory restriction on the use of Title X funds for activities which promote abortion as a method of family planning). In addressing the allegation that the federal regulation "conditioned the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling," the court held that the Title X grantee was not forced to give up any right because they were allowed to keep abortion related activities separate and distinct from Title X activities. *Id.* at 196. The court did point out that "unconstitutional conditions cases involve situations in which the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus prohibiting the recipient from engaging in the conduct outside the scope of the federally funded program." *Id.* The recipients of USAID seem to fall into this category, because they are prohibited from engaging in activities separate and distinct from the federal funds they receive. See generally 3 C.F.R. 873 (restricting recipients from abortion related activities even if non-USAID funds are used). In *FCC v. League of Women Voters of Calif.*, the court examined a law which barred recipients of federal funds from all editorializing. See 468 U.S. 364, 367 (1984). The court looked at the effect of the regulation which essentially prohibited an organization which received only 1% of its total funding from federal funds from all editorializing even if it used private funds to finance editorial activity. See *FCC v. League of Women Voters of Calif.*, 468 U.S. at 400. The court invalidated the federal regulation noting that had the government allowed the recipient to establish an affiliate organization "which could then use the stations facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." See *FCC v. League of Women Voters of Calif.*, 468 U.S. at 400. The Mexico City Policy has a similar effect on its recipients as the recipients of the federal funds in *FCC v. League of Women Voters of Calif.*. Unfortunately, the recipients of USAID funds do not have standing to raise this constitutional issue. See *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 283-87 (D.C. Cir. 1989).

study, these countries tend to have the highest maternal mortality rates, highest incidence of HIV/AIDS in both men and women, and the highest occurrence of anemia in pregnant women worldwide.²⁹¹ Further, the women living in these countries have the lowest percentage of contraceptive use, lowest rate of prenatal care, and the lowest amounts of births attended by skilled personnel worldwide.²⁹² These are the women of the world who are most in need of family planning services; however, the Mexico City Policy endangers their access to these services, because these countries are also the most in need of abortion reform which the Global Gag Rule prohibits.

The NGOs in these countries are the voice for these women by utilizing research to lobby the United Nations and their own governments in an effort to decriminalize abortion. The NGOs are the voice for the women like those found in Nepal, who are imprisoned, in some cases with their children, for the crime of abortion. If it were not for the assistance of NGOs lobbying the government of Nepal to release these women from prison, most of them would be serving their full sentence. The voice of the poorest women in the world should not be silenced.

This comment proposes the removal of the section in the Mexico City Policy which includes lobbying in the definition of "promotion of abortion."²⁹³ The list of activities which constitute promotion of abortion activities forbidden under the Mexico City Policy is non-exhaustive, thus it is too broad and open for wide interpretation. The definition of "promotion of abortion" should be a narrow construction so as not to hinder the human rights efforts of women in developing countries. Under my proposal, lobbying for the decriminalization of abortion could be done by recipient organizations with the provision they use their own, non-USAID funds. This would enable NGOs to lobby for abortion reform in their countries, while still providing vital family planning services in their countries.

X. CONCLUSION

The leading cause of mortality of women in developing countries can be attributed to complications associated with pregnancy and child-

291. See POPULATION ACTION INT'L, THE PAI REPORT CARD 2001: A WORLD OF DIFFERENCE SEXUAL AND REPRODUCTIVE HEALTH AND RISKS (2001).

292. See *id.*

293. 3 C.F.R. 873, 877-78. Promotion of abortion under the Mexico City Policy includes "[l]obbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning." *Id.*

birth.²⁹⁴ Poor, young women face the highest risk of dying from unsafe abortions.²⁹⁵ An improved family planning healthcare system, can greatly diminish death and injury to women during pregnancy and childbirth by making reproductive services more accessible.²⁹⁶

Since the Mexico City Policy has been reinstated, numerous individuals and organizations, as well as the Senate, have spoken out against this infringement on women's rights and free speech.²⁹⁷ As recently as November 5, 2001, thirty-six organizations signed a letter that was sent to President George W. Bush asking him to repeal the Mexico City Policy.²⁹⁸ This incident greatly reflects the fact that members of the national and international community are not willing to give up the fight to repeal this rule.²⁹⁹

In any case, the issue should not be whether abortion is moral or immoral, but rather focus on the negative effects the Mexico City Policy has on the lives of women in developing nations. Daniel E. Pellegrum, President of Pathfinder International, stated in his testimony before the Senate that he is unaware of any research which demonstrates a decline in abortion rates.³⁰⁰ Further, any claims attributing a decrease in abortion rates to the Mexico City Policy are unsubstantiated.³⁰¹ In addition, a study conducted by the Population Crisis Committee found the Mexico City Policy did not have the desired effect of decreasing the abortion rate.³⁰² The Mexico City Policy, however, is endangering the lives of women in developing countries by restricting their access to family planning services.

Access to family planning services plays a major role in diminishing the abortion and high maternal mortality rate in developing countries.³⁰³

294. MARY T. CURTIN, U.S. DEP'T OF STATE, BEIJING DECLARATION AND PLATFORM FOR ACTION OF THE UNITED NATIONS FOURTH WORLD CONFERENCE ON WOMEN, in *THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE* 507 (Carol Elizabeth Lockwood et al. eds. 1998).

295. *Id.*

296. *Id.*

297. *See Rights Groups Send Letter to President Bush Asking Him to Lift Gag on Free Speech*, U.S. NEWSWIRE, Nov. 5, 2001, available at 2001 WL 2873825.

298. *See id.*

299. The proponents of the Mexico City Policy, however, also have a strong following. Many of them believe the CRLP is trying to insinuate that international policies should trump domestic policies. *Hearings*, statement of Daniel E. Pellegrum, *supra* note 217.

300. *Id.*

301. *Id.*

302. Rayman-Read, *supra* note 96.

303. *Lifting the Gag Rule Prevents Abortions*, ALLENTOWN MORNING CALL, May 16, 2001 at A14; *Increasing the Body Count*, STAR-LEDGER, May 22, 2001, at O12 available at 2001 WL 21343292; Rebecca J. Cook, *U.S. Population Policy: Sex, Discrimination, and Principles of Equality Under International Law*, 20 N.Y.U.J. INT'L L. & POL 93, 107 (1987).

Studies show abortion-related deaths decrease in countries that have decriminalized abortion.³⁰⁴ After the Fourth World Conference on Women, several countries liberalized their existing abortions laws in an effort to reduce the high rate of maternal mortality.³⁰⁵ The trend in developing countries is abortion reform and the Mexico City Policy should not hinder this trend.

Why, then, should the United States continue a foreign economic assistance program? The answer is that there is no escaping our obligations: our moral obligations as a wise leader and good neighbor in the interdependent community of free nations—or economic obligations as the wealthiest people in a world of largely poor people, as a nation no longer dependent upon the loans from abroad that once helped us develop our own economy—and our political obligations as the single largest counter to the adversaries of freedom.³⁰⁶

—President John F. Kennedy

The United States stands for freedom and democracy. The restrictions imposed on foreign recipients of USAID are not very democratic, however. The Mexico City Policy restricts NGOs from practicing a basic freedom our own citizens treasure, the freedom of speech. Restrictions should not be applied to foreign NGOs when they would not be enforceable or acceptable to our own citizens. Women in developing nations should enjoy the same reproductive freedoms as those held by women of developed nations. A woman should be free to choose all the information and advice she seeks in order to make an educated reproductive decision. As a wise nation and a good neighbor we should not try to control the abortion laws of other nations indirectly.

304. CENTER FOR REPROD. RIGHTS, SAFE ABORTION: A PUBLIC HEALTH IMPERATIVE (2000) at http://www.crlp.org/pub_fac_atksafe.html (last visited Mar. 25, 2003).

305. CENTER FOR REPROD. LAW AND POLICY, *Abortion Laws in the Post-Cairo World* (1999).

306. U.S. AGENCY FOR INT'L DEV., *supra* note 18.